(6)

No. 83-963-CSX
Status: GRANTED

Title: Board of License Commissioners of the Town of Tiverton, Petitioner
v.
Louis H. Pastore, Jr., etc., et al.

Docketed:
December 9, 1983

Court: Supreme Court of Rhode Island

Counsel for petitioner: Managhan, Kathleen

Counsel for respondent: Hines Jr., John H.

Entry	Date	Note	Proceedings and Orders
1	Oct 6 1983		Application for extension of time to file petition and order granting same until December 15, 1983 (Brennan, October 7, 1983).
2	Dec 9 1983	G	Petition for writ of certiorari filed.
3	Jan 11 1984		DISTRIBUTED. February 17, 1984
5	Jan 27 1984	P	Response requested. (Due February 27, 1984 - NONE RECEIVED)
7	Feb 17 1984		Order extending time to file response to petition until March 13, 1984.
10	Apr 10 1984		Brief of respondent Pastore, Louis H., et al. in opposition filed.
11	Apr 11 1984		REDISTRIBUTED. April 27, 1984
12	Jun 22 1984		REDISTRIBUTED. June 28, 1984
13	Jul 5 1984		Petition GRANTED.
			**********
15	Aug 6 1984		Order extending time to file brief of petitioner on the merits until August 27, 1984.
16	Aug 20 1984		Joint appendix filed.
17	Aug 20 1984		Brief of petitioner Bd. of License Commrs. filed.
18	Sep 7 1984		Record filed.
19	Sep 7 1984		Certified copy of original record filed.
20	Oct 22 1984		SET FOR ARGUMENT. Tuesday, November 27, 1984. (2nd case).
21	Nov 8 1984		Brief of respondents Pastore, Louis H., et al. filed.
22	Nov 8 1984		CIRCULATED.
23	Nov 27 1984		ARGUED.

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83-963

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON,
PETITIONER,

v.

LOUIS H. PASTORE, JR., in his capacity as
Liquor Control Administrator of the
State of Rhode Island and
ATTIC LOUNGE, INC.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

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I.

QUESTION PRESENTED

Whether the exclusionary rule, prohibiting as violative of the Fourth Amendment to the United States Constitution the use in a criminal trial of evidence obtained pursuant to an unlawful search and seizure (the Fourth Amendment made applicable to the states through the Fourteenth Amendment), should properly be applied to exclude the admission of such evidence in a civil administrative proceeding.

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PETITION FOR A WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

Opinion Below

The opinion of the Rhode Island Supreme Court in the instant case is cited at 463 A.2d 161 and is set forth in the Appendix herein, pages A-1 through A-10.

Jurisdiction

The Petitioner here seeks review of the decision in this matter rendered by the Rhode Island Supreme Court on July 18, 1983 to the extent that said decision upholds the Providence

County Superior Court in its determination that the exclusionary rule, prohibiting pursuant to the Fourth and Fourteenth Amendments of the United States Constitution the use in a criminal trial of evidence obtained pursuant to unlawful search and seizure, is properly applicable to the proceedings of a municipal liquor license control board. In this case, such a ruling prevented the Petitioner from receiving unlawfully obtained evidence, evidence which if admissible, would have justified the revocation of a liquor license.

Subsequently, the United States Supreme Court granted Petitioner's request for an extension of time within which to file a Petition of Certiorari to December 15, 1983.

The Court's jurisdiction to review the decision of the Rhode Island Supreme Court by Writ of Certiorari is conferred by 28 U.S.C. Section 1257 (3).

Constitutional Provisions Involved

1. The Fourth Amendment to the Constitution of the United States.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. The Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

> liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also relevant are Rhode Island General Laws Section 9-19-25 cited at A-12, and Rhode Island General Laws Section 3-5-23 cited at A-11.

Statement of the Case

This Petition comes before this Court as a request to review a decision of the Rhode Island Supreme Court, which decision in turn was a review of a lower Rhode Island court decision pursuant to a Certiorari Petition requested by the Board of License Commissioners of the Town of Tiverton, Rhode Island. In Tiverton, as in other Rhode Island cities and towns, the Town Council serves as a Board of License Commissioners for the purpose of granting, renewing, suspending or terminating liquor licenses within the town. In March of 1977, Respondent, the Attic Lounge, Inc. was a licensed liquor-serving establishment within the Town of Tiverton. On March 11, 1977 several Tiverton police officers entered the Lounge pursuant to a search warrant and found stolen property on the premises. As a result, two actions were initiated. Criminal proceedings were initiated against individuals associated with the Attic Lounge by the State of Rhode Island for possession of stolen property. At the same time, the Tiverton Town Council, acting as a Board of License Commissioners, revoked the bar's liquor license pursuant to Rhode Island General Laws Section 3-5-23 after a hearing at which evidence of the finding of the stolen property was presented. Rhode Island General Laws Section 3-5-23 provides for the revocation of a liquor license where a licenseholder permits any of the laws of the State of Rhode Island to be violated on the licensed premises. (R.I. G.L. Section 3-5-23 is recited in full at A-11) The criminal proceedings were ultimately dismissed after a judge of the

Rhode Island Superior Court (Rhode Island's criminal trial court) held that the search warrant obtained by the Tiverton police to search the Lounge was defective.

The principals of the Attic Lounge, Inc. appealed the revocation of the Lounge's liquor license to Respondent Louis Pastore, then Liquor Control Administrator for the State of Rhode Island. The Administrator held a de novo hearing on July 6, 1978 and received undisputed evidence that a conviction for possession of stolen property had never been obtained against any individual associated with the Lounge. The Administrator, believing that a conviction was necessary in order for a town to assert the provisions of R.I.G.L. 3-5-23, reversed the revocation of the Lounge's license and ordered that the license be reinstated.

Thereafter Petitioner filed an appeal to the Providence County Superior Court (which had statutory authority to review rulings of the Liquor Control Administrator) which affirmed the Administrator's ruling. The Superior Court held that the Administrator had erred in holding that a conviction was necessary to revoke a liquor license pursuant to R.I.G.L. Section 3-5-23. However, the Court held that because evidence of the stolen property at the Attic Lounge premises had been obtained pursuant to a void search warrant, the exclusionary rule barred the presentation of such evidence before the Board of License Commissioners which could not therefore rely upon it in revoking the Attic Lounge's liquor license.

Petitioner then filed a Petition for Writ of Certiorari with the Rhode Island Supreme Court seeking review of the Superior Court's decision. That petition was granted by the Rhode Island Supreme Court which reviewed the Superior Court's decision and affirmed the holding that the exclusionary rule ought properly to be extended to municipal liquor license revocation proceedings. Petitioner seeks judicial review by this Court of the Rhode Island Supreme Court's decision.

The Rhode Island Supreme Court in its decision discussed the genesis of the exclusionary rule, (which bars the admission in a criminal trial of evidence obtained by an illegal search and seizure) in *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and its later extension to state criminal trials in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The acceptance of this rule in Rhode Island is symbolized by the enactment by the Rhode Island General Assembly of Rhode Island General Laws Section 9-19-25 (A-12) which codifies as an evidentiary rule in criminal trials in Rhode Island the provisions of *Weeks* and *Mapp*.

The Rhode Island court admitted that it could find no decision by this Court determinative of the question of whether the exclusionary rule should be applied to administrative hearings. Its decision to extend the rule to the liquor license hearing in issue was heavily dependent on this Court's decision in *One 1958 Plymouth Sedan* v. *The Commonwealth of Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965). This appeal concerned a petition by the Commonwealth of Pennsylvania for the forfeiture of an automobile which had allegedly been used to transport unsealed liquor bottles. The discovery of the liquor bottles was determined to have resulted from an illegal search and seizure. This Court extended the exclusionary rule to the forfeiture proceeding relying on an earlier decision in *Boyd* v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), that forfeiture proceedings, though denominated civil by the Commonwealth, were quasi-criminal in nature and therefore subject to the same constitutional protections as purely criminal proceedings. The *Plymouth Sedan* ruling relied heavily on the reasoning, also dispositive in *Boyd*, that any proceeding instituted for the purpose of forfeiting a man's property because of offenses committed by him is criminal in nature, and therefore subject to the restraints of the exclusionary rule.

The Rhode Island court also touched on this Court's ruling in *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), from which it extracted the holding that in extending the exclusionary rule past the initial criminal trial, the potential benefits of applying the rule were to be balanced against the potential for damage from such application. The Rhode Island court however was decidedly unbalanced in applying the balancing test, for it limited its consideration only to the benefits of extension, with very little discussion of the disadvantages. In support of its holding the court relied on the New York Court of Appeals decision in *Finn's Liquor Shop* v. *State Liquor Authority*, 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584, *cert. denied* 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969) which extended the exclusionary rule to liquor license proceedings and by express dicta, to any administrative hearings involving penalties, forfeitures and other sanctions. Both *Finn's* and the Rhode Island decision as well, contain holdings that the exclusionary rule should not be limited in its application where there is any indication that such limitation would encourage future illegal searches.

The Rhode Island Supreme Court also discussed this Court's ruling in *United States* v. *Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), in which this Court declined to extend the exclusionary rule to civil proceedings that were intersovereign in nature, e.g., where the law enforcement officer conducting the unlawful search had no responsibility to the agency now seeking to use the fruits of the search for evidence. The Rhode Island court however distinguished *Janis* by typifying the factual situation before it as *intra*sovereign, no doubt because the Tiverton police who searched the Attic Lounge were indeed servants of the Board of License Commissioners when the Board was wearing its Council hat.

The Rhode Island court noted Petitioner's argument that it had declined to extend the rule to probation revocation hearings (*State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978)), or

to bail revocation hearings (*Bridges* v. *Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978)). The court's response however was to find a greater public interest in supervision over bail and probation offenders than in the proper conduct of enterprises licensed to sell and distribute alcoholic beverages. This, together with the court's concern that unconstitutionally obtained evidence not be admissible in "quasi-criminal" administrative proceedings, chiefly explain the decision which it reached.

Reasons for Granting the Writ

Petitioners believe that the question presented by this petition, the correctness of applying the exclusionary rule to civil administrative proceedings, has not received direct consideration by this Court, and has received disparate treatment by various state supreme courts.

This Court's most relevant rulings are *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania*, *supra*, which extended the rule to forfeiture proceedings because of the quasi-criminal nature of the proceedings, *United States* v. *Calandra*, *supra*, where the question of whether to extend the rule to grand jury hearings gave rise to the "balancing test" referred to by the Rhode Island Supreme Court, and *United States* v. *Janis*, *supra*, a decision responsible for the before discussed "intersovereign rule."

Of these, the *Calandra* balancing test and the *Plymouth Sedan* quasi-criminal test are most referred to by state courts in wrestling with this issue. At one extreme is the New York Court of Appeals, which in *Finn's Liquor Shop* v. *State Liquor Authority*, *supra*, has held that the rule must be applied to all administrative hearings if its function of deterring police misconduct is to be fulfilled.

Not all jurisdictions have gone this far. The decision at issue is Rhode Island's first pronouncement on the issue of extending the rule to civil administrative hearings, though earlier Rhode

Island decisions have, after balancing the interests, declined to extend the rule to probation revocation hearings (*State* v. *Spratt*, *supra*) or bail revocation hearings (*Bridges* v. *Superior Court, et al.*, *supra*). Although the Rhode Island court declined to generalize, language in its opinion (A-9) would indicate that it is unlikely to be sympathetic to limitations on the rule in other administrative settings—the proscription of criminal behavior through licensing not being viewed as vital a public concern as the supervision of bail and probation violators.

The Ohio and Illinois Supreme Courts have held otherwise in two cases cited in Petitioner's brief to the Rhode Island Supreme Court but not discussed in its decision. The Illinois Supreme Court in *Daley* v. *Berznaskis*, 47 Ill.2d 395, 269 N.E.2d 716, *cert. denied* 402 U.S. 999, 91 S.Ct. 2173, 29 L.Ed.2d 166 (1971) declined to extend the exclusionary rule to liquor license revocation hearings, despite this Court's holding in *Plymouth Sedan*, holding the unique nature of the liquor business to be such as justified more intense governmental supervision. The Ohio Supreme Court held similarly in *Soloman* v. *Liquor Control Commission*, 3 Ohio St.2d 31, 212 N.E.2d 595 (1965), *cert. denied* 384 U.S. 928, 86 S.Ct. 1445, 16 L.Ed.2d 531. Both Ohio and Illinois held that application for a liquor license constitutes assent to any reasonable, but warrantless, search a license authority might make as a means of supervising liquor-serving establishments.

A leading California case is *Emslie* v. *State Bar of California*, 11 Cal.3d 210, 113 Cal. Rptr. 175, 520 P.2d 991 (1974) concerning extension of the rule to attorney disciplinary proceedings of the state bar association. California has traditionally applied a balancing test, but the *Emslie* court also had as precedent a California decision very similar to *Plymouth Sedan*, *People* v. *One 1960 Cadillac Coupe*, 62 Cal.2d 92, 41 Cal. Rptr. 290, 396 P.2d 706 (1964). In *Cadillac*, the California Supreme Court had similarly held the rule applicable to

forfeiture proceedings which, by their nature, were held to be quasi-criminal both in the potential for deprivation of liberty or property, and in the close identity of such proceedings with the aims and objectives of criminal law enforcement.

In *Emslie* however, the California Supreme Court declined extension, believing that no deterrent effect on police conduct would result and that social considerations—protection of the courts and the integrity of the legal profession—mandated a different result from *Cadillac*. The *Emslie* decision has since been relied on by a lower California appellate court to deny extension of the rule to liquor license revocation proceedings. See *Baxter Rice* v. *Alcoholic Beverages Control Appeals Board, et al.*, 187 Cal. Rptr. 117, 137 Cal.App.3d 478 (1982).

Petitioner believes that the diverging results reached by these state courts in extending the exclusionary rule to administrative proceedings mandate that this Court clarify what the appropriate judicial test should be in extending the rule to such hearings, if it is to be extended to administrative hearings at all. The existence of three relevant United States Supreme Court decisions has allowed lower Supreme Courts to choose the test they believe will support the decision they wish to make. Thus, a court wishing to justify extension of the rule (e.g., the Rhode Island Supreme Court in the case at bar and the New York Court of Appeals in *Finn's*) does so by emphasizing the quasi-criminal aspects of the administrative hearing and the possibility of a penalty or forfeiture which may result. A court which wishes to maintain a looser approach (such as the California Supreme Court) relies on the balancing test, tackling the question of extension of the rule on a case by case basis. It is the use of the balancing test however which leads to the most divergent results—a good example is to contrast the importance to society attributed to liquor license control by the Rhode Island Supreme Court in the case at bar with that attributed by the Illinois court in *Daley*.

California's case by case approach may seem the most judicious. However, the lack of predictability which such an approach engenders should cause this Court to be skeptical that the results will enhance the efficacy of the exclusionary rule or administrative justice in general. This Court, in *United States* v. *Janis, supra*, found the cost to society too high, and the marginal additional deterrence too low to forbid the use of tainted evidence in a civil proceeding by a sovereign different from the authority employing the errant police. Although the *Janis* court specifically declined to comment on the possibility of such attenuated deterrence in "intrasovereign" situations, such as here,[1] the thrust of that decision is that extension of the exclusionary rule should not be encouraged where the additional deterrence factor will be low. What seems clear to Petitioner is that the various rulings by state courts on the issue posed by this Petition have resulted in another form of attenuation; law enforcement officers in most jurisdictions pursue their search for criminally relevant evidence knowing that unlawful methods will result in such evidence being excluded from criminal proceedings, but they have very little certainty that such evidence would be excluded in any other forum. Without such certainty, it is unlikely that the possible inadmissibility of such evidence at a later civil hearing has any effect on their conduct. Petitioner doubts that this Court would support the blanket extension of the exclusionary rule advocated by the New York Court of Appeals, but as a practical matter it is only in such jurisdictions that law enforcement officers proceed with any assurance as to the treatment of improperly obtained evidence in any civil proceeding where it might be relevant. Short of adopting the New York rule, this

[1] There is even a question in Petitioner's mind as to whether the instant case presents an intra or intersovereign issue. Admittedly the Tiverton police officers were employees of a Town Council sovereign, which in another guise served as a Board of License Commissioners. However, in conducting the initial search of the Attic Lounge, the police officers were essentially acting as enforcers of state law.

Court's clarification of proper and/or improper extension of the rule to civil administrative hearings would standardize state supreme court rulings on this question, and hopefully insure a more even-handed, practical application of the rule.

Petitioner believes that the forfeiture test of *Plymouth Sedan* needs further refinement and may have outlived its usefulness. It seems safe to say that most administrative hearings where tainted evidence would be relevant could be labelled quasi-criminal because of the possibility of a disposition such as a forfeiture (as of an automobile), a penalty such as a fine, loss of a property right (such as a liquor license), or loss of a job (such as in *Emslie*). Petitioner does not believe that this Court would intend that its *Plymouth Sedan* holding be applied as broadly as it was applied by the Rhode Island Supreme Court below which termed a liquor license revocation proceeding quasi-criminal (and ergo subject to the exclusionary rule) since its object is to penalize for the commission of an offense against the law. (A-4) As it stands now, however, the forfeiture test, or quasi-criminal test can be interpreted to justify extension of the rule to most, if not to all, administrative hearings at which it would be relevant.

Petitioner believes that review of the Rhode Island Supreme Court holding below represents an excellent opportunity for this Court to review and further clarify the issue of civil extension of the exclusionary rule. The Rhode Island court's heavy reliance upon the *Plymouth Sedan* quasi-criminal standard would give this Court an opportunity to state whether it is in fact correct to extend the exclusionary rule to a hearing simply because one of the results of the hearing may be a penalty. Petitioner suspects that this Court would not countenance such a conclusion, the effect of which would be to negate the balancing test proposed by this Court in *Calandra*.

Review would also give this Court an opportunity to clarify proper application of the balancing test, particularly with regard to civil administrative proceedings and to further

define what type of societal interests should be of greatest judicial concern as opposed to the marginal deterrence achieved by further extension of the rule. Again, the instant case would be an excellent one for review since liquor control hearings provide a common forum where application of the rule has been raised, with differing results. Petitioner believes that this Court would decline to approve such extension, but would hold instead that the phalanx of laws, regulations and licensing requirements enacted by all states and municipalities to control liquor sales evidence a societal concern that the sale of liquor be carried out in a law abiding manner and that the potential for criminal activity and/or involvement be limited.

Finally, this case will give this Court a chance to answer the question remaining unanswered from its *Janis* decision, how courts should evaluate "intrasovereign" applications of the exclusionary rule. Petitioner believes that the doubts expressed by the *Janis* court as to the utility of the rule in discouraging police misconduct would cause it to overrule the Rhode Island Supreme Court, and to hold that the rule is misapplied when it is extended to civil administrative hearings, such as liquor control hearings.

Conclusion

The Rhode Island Supreme Court's decision placed the Town of Tiverton in the position of being compelled to license a liquor-serving establishment known to be a storage site for stolen property, run by principals who had obviously participated in the commission of a theft. Believing that such a result represents an unwarranted extension of the exclusionary rule, Petitioner requests that this Court issue a Writ of Certiorari to review the decision of the Rhode Island Supreme Court below.

Respectfully submitted,

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Appendix A

SUPREME COURT

No. 80-426-M.P. No. 0251E

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON

v.

LOUIS H. PASTORE ET AL.

OPINION
JULY 18, 1983

WEISBERGER, J. This case comes before us on petition for certiorari seeking review of a Superior Court judgment that affirmed a ruling of the Liquor Control Administrator reinstating the class-BV liquor license of the Attic Lounge (the Lounge). The only issue before this court is whether evidence obtained pursuant to an illegal search and seizure is admissible in a liquor-license revocation hearing. We find that the trial justice committed no reversible error. Accordingly, we affirm.

The facts in this case may be briefly summarized as follows. On March 11, 1977, a Tiverton police sergeant, pursuant to a search warrant, entered and searched the Lounge. He discovered stolen property on the premises. Thereafter, the Board of License Commissioners of the Town of Tiverton (the board), held a hearing at which the Lounge failed to show cause why its liquor license should not be suspended for permitting state law to be violated, pursuant to G.L. 1956 (1976 Reenactment) § 3-5-23. The board voted to revoke the estblishment's liquor license, thereby prompting an appeal to the State Liquor Control Administrator (the administrator). During the pendency of this appeal, a Superior Court justice, in a criminal proceeding stemming from the same incident, ruled that the search of the Lounge was illegal.

Pursuant to respondent's appeal, the administrator held a de novo hearing on July 6, 1978. Therein undisputed testimony was introduced establishing that a conviction for possession of stolen property had never been obtained against any individual associated with the Lounge. The administrator therefore refused to entertain any evidence concerning the search of the premises or the results thereof. Accordingly, he found that because a conviction for receiving stolen goods had never been obtained, there was no justification for revocation of the Lounge's liquor license. He therefore ordered that the license be reinstated.

Thereafter, petitioners filed an appeal to the Superior Court, which affirmed the administrator's ruling. The Superior Court justice disagreed with the rationale utilized by the administrator, however, when she found that a conviction was not necessary to revoke a liquor license pursuant to G.L. 1956 (1976 Reenactment) § 3-5-23. Nevertheless, the court held that since the search of respondent's premises was illegal in nature any evidence or testimony concerning the search was properly excluded by the administrator.

The petitioners contend that the exclusionary rule should not be applicable in a liquor-license revocation hearing. Although we have not heretofore passed upon this issue, courts elsewhere have ruled the evidence inadmissible. We agree with that result.

The exclusionary rule, which bars the admission in a criminal trial of evidence obtained by an illegal search and seizure, was first promulgated by the United States Supreme Court in *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and was later extended in application to state criminal proceedings by the decision in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). A precise overall definition of the type of proceeding, other than criminal, to which the rule should be applied has not yet been determined. Indeed, the Supreme Court has not yet decided

whether the exclusionary rule will be construed to apply to administrative hearings. 1 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.5 at 97 (1978). Nonetheless, by reference to Supreme Court decisions on related matters and to persuasive precedent from other jurisdictions, we feel that there is a sufficient basis upon which to conclude that the exclusionary rule is applicable to a liquor-license revocation hearing. *Id.*, § 1.5 at 97-98.

In *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), the State of Pennsylvania sought to confiscate a vehicle pursuant to a statute that provided for the forfeiture of a vehicle carrying unsealed liquor. However, in criminal proceedings, the owner was acquitted because of the exclusion of the illegally seized liquor. The court held that although forfeiture proceedings are civil in nature, the exclusionary rule should apply. Quoting with approval language from *Boyd* v. *United States*, 116 U.S. 616, 634, 6 S.Ct. 524, 534, 29 L.Ed. 746, 752 (1886), the Court held that

> "[i]f the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form,—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one.*** As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution***." 380 U.S. at 697-98, 85 S.Ct. at 1249, 14 L.Ed.2d at 173.

Thus *Plymouth Sedan* stands for the proposition that the exclusionary rule should apply to proceedings that are " 'quasi-criminal' in character" in that their object "is to penalize for the commission of an offense against the law." 1 LaFave, § 1.5 at 98. Accordingly, it is reasonable to conclude that the exclusionary rule applies in administrative proceedings, wherein a state agency, responsible for control of liquor sales, is empowered to impose fines or declare forfeitures of licenses for criminal acts and other violations by those operating or connected with the establishment. *Id.* Professor LaFave comments that the Court in *Plymouth Sedan* indicated that a forfeiture proceeding could result in punishment greater than the criminal prosecution for the underlying conduct. This strongly suggests that a highly relevant factor to be considered is the magnitude of the consequences for the individual involved. Therefore, other courts have appropriately stressed the seriousness of taking away a person's license to operate an establishment selling liquor. *Finn's Liquor Shop* v. *State Liquor Authority*, 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584, *cert. denied*, 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969); *Leogrande* v. *State Liquor Authority*, 25 A.D.2d 225, 268 N.Y.S.2d 433 (1966), *rev'd on other grounds*, 19 N.Y.2d 418, 227 N.E.2d 302, 280 N.Y.S.2d 381 (1967); *Pennsylvania Liquor Control Board* v. *Leonardziak*, 210 Pa. Super. 511, 233 A.2d 606 (1967). Thus, "it would be anomalous***to hold that in [a] criminal proceeding, illegally seized evidence is excludable, while in [a] forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." *Plymouth Sedan*, 380 U.S. at 701, 85 S.Ct. at 1251, 14 L.Ed.2d at 175.

In *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), the approach of the Court was to balance the potential benefits of applying the exclusionary rule, namely the added deterrence, against the potential damage

from such application. Hence, a second important consideration in determining whether the exclusionary rule should apply in administrative proceedings is the extent to which exclusion would deter illegal searches and seizures. Thus, exclusion for purposes of deterrence would be justified if admission of the evidence could be expected to encourage future illegal searches by such agents because of their expectation that in any event the evidence would be admissible in the administrative process.

Various state courts have considered this issue. In *Finn's Liquor Shop* v. *State Liquor Authority*, *supra*, the New York Court of Appeals held that the exclusionary rule, concerning illegally seized evidence is applicable to administrative proceedings before the State Liquor Authority with respect to imposition of penalties on license holders. The court in its opinion stated that if the exclusionary rule is to be effective, it may not be limited to purely criminal proceedings. The court declared that "[i]t is no longer subject to question that [s]tate agencies charged with purely administrative responsibilities, just as those engaged in the enforcement of the criminal law, must conduct their investigative and enforcement functions in compliance with constitutional requirements and, more particularly, within the confines of the Fourth Amendment. (*See*, *Camara* v. *Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *See* v. *City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967))." *Finn's Liquor Shop*, 24 N.Y.2d at 654, 249 N.E.2d at 442-43, 301 N.Y.S.2d at 588.

In *Leogrande* v. *State Liquor Authority*, *supra*, the Appellate Division of the New York Supreme Court held that evidence obtained by search warrants indicating that the licensee engaged in gambling activities on and off the licensed premises could not be used by the State Liquor Authority as a basis for the cancellation of an establishment's license when the search warrants in related criminal cases had been vacated for want of probable cause. In so holding the court stated that

"the reasons in policy which [support] the application of the exclusionary rule to illegal searches and seizures by public officers in criminal proceedings apply equally to administrative proceedings." 25 A.D.2d at 231, 268 N.Y.S.2d at 440. Such proceedings include those involving penalties, forfeitures or other sanctions for the violation of law. "The exclusionary rule rests on a theory of deterrence; that policy would not be served if the illegal official activity could be used, despite unavailability in criminal proceedings, to effect parallel sanctions of forfeiture in an administrative proceeding." *Id.* at 232, 268 N.Y.S.2d at 440.

The applicability and rationale behind the use of the exclusionary rule in liquor-board administrative hearings is further set forth in *Pennsylvania Liquor Control Board* v. *Leonardziak*, *supra*. Therein the court held that

> "[t]he purpose of the exclusionary rule is'* * * to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). The policy of deterring unconstitutional activity by suppressing evidence would not be served if police, after being barred from using evidence against a licensee in a criminal court, could use the identical evidence to punish with equal or greater severity through the machinery of the Liquor Control Board." 210 Pa. Super. at 514, 233 A.2d at 608.

For these reasons, we believe that it is certainly appropriate to apply the exclusionary rule in administrative proceedings when the police have searched premises known to be licensed for the sale of liquor and have turned over the fruits of the search to the administrative agency empowered to revoke the license. 1 LaFave, § 1.5 at 100. Accordingly, we hold that a board of liquor-license commissioners should not be permitted to avail itself of the fruits of an illegal search in order to impose sanctions upon the persons whose constitutional rights have been violated.

The petitioners contend, however, that the holding in *Plymouth Sedan*, is inapplicable to the present controversy. Their contention is based on the assertion that a proceeding that is quasi-criminal in nature is different from a liquor-license revocation hearing that is civil in nature. *Chernov Enterprises, Inc.* v. *Sarkas*, 109 R.I. 283, 284 A.2d 61 (1971); *Cesaroni* v. *Smith*, 98 R.I. 377, 202 A.2d 292 (1964). A careful analysis of the Supreme Court's definition of a quasi-criminal proceeding, however, reveals that this argument misses the mark. In *Plymouth Sedan* the Court, agreeing with the determination of Mr. Justice Bradley in *Boyd*, found that a forfeiture proceeding is quasi-criminal in nature in that its object is to penalize for the commission of an offense against the law. 380 U.S. at 700, 85 S.Ct. at 1250, 14 L.Ed.2d at 175. Although technically a civil proceeding, a license revocation based on an illegal search and seizure to uncover stolen goods is in substance and effect a quasi-criminal proceeding since its object is to penalize for the commission of an offense against the law, thereby invoking the application of the exclusionary rule.

The petitioners further suggest that *United States* v. *Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), provides support to a jurisdiction hesitant about expanding the scope of the exclusionary rule. We do not concur. In *Janis*, the Supreme Court held that evidence seized by a state criminal-law-enforcement officer in good faith, but nonetheless in an unconstitutional manner is admissible in a civil proceeding brought by or against the United States. The Court distinguished between two types of situations for the purpose of applying the exclusionary rule in civil proceedings: (1) those cases in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence (intrasovereign) and (2) those cases in which the officer had no responsibility or duty to, or agreement with, the sovereign seeking to use the evidence (intersovereign).

However, the Court specifically declined to rule on the applicability of the exclusionary rule in an intrasovereign setting, which is the situation before us on review. Nevertheless, we believe that the potential deterrent effect of the exclusionary rule on the agents of an intrasovereign agency is strong enough to outweigh the costs to society of refusing to admit evidence obtained in violation of constitutional imperatives. *See* 1 Ringel, *Searches & Seizures, Arrests and Confessions*, § 3.6(c) at 3-32 (1982).

Our view is supported by the recent decision in *Lopez-Mendoza* v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983), which dealt with the intrasovereign situation enunciated in *Janis*.[1] The court held that when an "offending officer and the prosecutor share a common goal, the deterrent effect of the exclusionary sanction is maximized: an officer will have little incentive to violate the Fourth Amendment if he knows that tainted evidence will be worthless to the prosecutorial agency he serves." *Id.* at 1069.

The petitioners, in support of their position that the exclusionary rule should not apply to liquor-license revocation hearings, urge us to utilize the same rationale that we used in *State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978), and *Bridges* v. *Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978). We are not so persuaded. In *Spratt*, the question of the application of the exclusionary rule was confronted in the context of a probation-revocation hearing whereas in *Bridges* we dealt with this issue in the context of a bail-reduction proceeding. Obviously, the prospect of having either a convicted violator or an individual charged with a crime who has violated the conditions of his

[1] Concededly, *Lopez-Mendoza* v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983), has a more compelling fact pattern than the case at bar to apply the exclusionary rule, because the Ninth Circuit court was dealing with a situation that not only was intrasovereign but also was intra-agency (Immigration and Naturalization Service). The general principles enunciated in that case, however, are applicable to the present controversy.

bail escape the consequences of his or her actions by application of the exclusionary rule would impose a substantial threat to society. Although the state has an interest in the proper conduct of enterprises licensed for the sale and distribution of alcoholic beverages, such interest does not weigh so heavily in determining the applicability of the exclusionary rule as does the appropriate supervision of persons who are on bail after having been formally charged with the commission of criminal offenses or on probation after having been convicted of a criminal offense. Furthermore, in deciding that the exclusionary rule should not apply in *Spratt* and *Bridges*, we enunciated the test to be used when we said:

> "[C]onsider whether any incresed deterrence of future police misconduct would result from extending the rule and then balance that incremental increase against the risks to society that extension is likely to produce." 120 R.I. at 194, 386 A.2d at 1095.

In *Mapp* the Supreme Court of the United States emphasized that the deterrence of police misconduct and the policy that the government should not benefit from its own wrongdoing are to be accorded great weight in this balancing process. Therefore, the Superior Court properly analyzed the effect of this balancing test on the issue at bar by concluding that evidence obtained as a result of an illegal police search is inadmissible at a hearing before the administrator.

Finally, petitioners contend that there is legislative justification for the admission of improperly obtained evidence in liquor-license revocation hearings. The petitioners cite G.L. 1956 (1977 Reenactment) §§ 3-12-3 and 3-2-6 in support of this proposition. We believe that petitioners misconceive the thrust of these statutes and tend to confuse the question of right of access to the premises with the question of applicability of the exclusionary rule. Section 3-2-6 authorizes access by inspectors or other officers charged with the duty of supervision or inspection of places licensed to deal in alcoholic beverages. Section 3-12-3 provides that municipal officials, which term

includes but is not limited to police officers, and members of the state police, may enter the premises of licensed premises "to ascertain the manner in which such person conducts his business and to preserve order." These statutes allow a right of access to licensed premises for the purpose of enforcing those statutes and regulations that relate to the conduct of licensed liquor establishments. Obviously, while such officers are properly upon the premises, they may act appropriately in respect to any violations of law that are committed in their presence or may act in respect to any evidence that may properly be within plain view. *See Texas* v. *Brown*, __ U.S. __, __ S.Ct. __, 75 L.Ed.2d 502 (1983); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

In this case, however, we are not confronted with the question of the propriety of the search and seizure that was allegedly conducted by a police officer of the Town of Tiverton. The police officer obtained a traditional criminal search warrant, and this search warrant was declared to be constitutionally infirm by a justice of a court of competent jurisdiction. Thus, the question of the validity of this search and seizure is not presently before this court.[2]

The sole question before us is whether evidence found by a court to be illegally obtained may be admitted in a proceeding for forfeiture of a license before the administrator. We hold that the exclusionary rule is applicable to such hearings and that evidence determined by a court or by the administrator to have been illegally obtained may not be admitted.

For the reasons stated, the petition for certiorari is denied. The writ heretofore issued is quashed. The judgment of the Superior Court is affirmed, and the papers in the case may be remanded to the Superior Court with our decision endorsed thereon.

[2] We recognize that the criteria for searches of regulated premises are less stringent than those applicable to other structures. *See United States* v. *Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (gun licensee); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor licensee).

Appendix B

Rhode Island General Laws

3-5-23. Revocation of license for criminal offenses or disorderly convictions — Action on bond. If any licensed person shall be convicted of violation of any of the provisions of this title, or of chapter 6, chapter 10, chapter 34, chapter 40 or chapter 45 of title 11, or of §11-2-1, §11-3-4, §11-9-13, §11-9-15, §11-11-5, §11-11-6, §§11-18-2, to 11-18-4, inclusive, §11-20-1, §11-20-2, §11-23-4, §11-27-20, §§11-30-1 to 11-30-11, inclusive, §11-31-1 or §§11-37-2 to 11-37-4, inclusive, or shall plead guilty or nolo contendere to any complaint or indictment thereunder, or if his license shall be revoked, his bond shall be put in suit by the town or city treasurer of the town where such bond is given, and by due process of law the penal sum thereof shall be recovered for the use of said town or city. If any licensed person shall permit the house or place where he is licensed to sell beverages under the provisions of this title to become disorderly so as to annoy or disturb the persons inhabiting or residing in the neighborhood thereof, or shall permit any gambling or unlawful gaming to be carried on therein, or shall permit any of the laws of this state to be violated therein, in addition to any punishment, penalty or penalties which may be prescribed by statute for such offense, he may be summoned before the board, body or official which issued his license or before the liquor control administrator when he and the witnesses for and against him may be heard; and if it shall be made to appear to the satisfaction of the board, body or official hearing such charges that he has violated any of the provisions of this title or has permitted to be done any of the things hereinbefore in this section mentioned, then said board, body or official may suspend or revoke his license or enter other order thereon. In case such license is revoked, such licensed person after such revocation shall cease to have any authority under said license and shall

be disqualified from holding any of the licenses provided for in this title for a period of five (5) years next following such revocation. And the revocation of a license, as aforesaid, shall not interfere with or prejudice the right of recovery upon his bond for the full amount thereof.

9-19-25. Illegally seized evidence inadmissible. In the trial of any action in any court of this state, no evidence shall be admissible where the same shall have been procured by, through or in consequence of any illegal search and seizure as prohibited in section 6 of article 1 of the Constitution of the State of Rhode Island.

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No. 83-963

In the Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON,
PETITIONER,

v.

LOUIS H. PASTORE, JR., in his capacity as
LIQUOR CONTROL ADMINISTRATOR of the
STATE OF RHODE ISLAND and
ATTIC LOUNGE, INC.,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTION PRESENTED

Whether the Rhode Island Supreme Court correctly held that the exclusionary rule is applicable in an Administrative Proceeding for the revocation or suspension of an alcoholic beverage license.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Statement of the Case

The Respondents submit that the Statement of the Case contained in the Petitioner's Petition for a Writ of Certiorari is a fair and accurate representation of this case and the proceedings below.

Argument

The Rhode Island Supreme Court, in the instant case, properly decided that the exclusionary rule should be extended to Civil Administrative hearings conducted by the Liquor Control Administrator. The decision of the Rhode Island Supreme Court was based upon the Fourth Amendment to the United States Constitution. The fact that the decision of the Rhode Island Supreme Court was predicated on Fourth Amendment principles is what the Petitioner is challenging.

Although this Honorable Court has not decided the exact question in issue, the case of *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) provides strong support for the decision reached by the Rhode Island Supreme Court. While not directly on point, *Plymouth Sedan*, *supra*, leads to the same conclusion reached by the Rhode Island Supreme Court. In *Plymouth Sedan*, *supra*, the owner of the vehicle referred to was driving that vehicle from New Jersey into Pennsylvania when the vehicle was illegally stopped and searched. Alcoholic beverages without Pennsylvania State Tax Seals were found in the trunk of the vehicle. The Commonwealth sought to confiscate the vehicle under a statute which provides for the forfeiture of a vehicle carrying unsealed liquor, despite the fact that in separate criminal proceedings the owner was acquitted due to the exclusion of the illegally seized liquor. While the forfeiture proceedings were civil in nature, *Plymouth Sedan*, *supra*, held that the exclusionary rule should nevertheless apply. The Court concluded:

> "A forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.... It would be anomalous...to hold that in a criminal proceeding, the illegally seized evidence is excludable, while in a forfeiture proceeding requiring the determination that the criminal law has been violated, the same evidence would be permissible."

Plymouth Sedan, *supra*, at Page 701.

Additionally, other State Courts have clearly decided the same issue in favor of the position adopted by the Rhode Island Supreme Court. *Commonwealth Liquor Control Board* v. *Mottola's 51 Tavern, Inc.*, 37 Pa. Cmwlth, 234, 389 A.2d 1213 (1978); *Pennsylvania Liquor Control Board* v. *Leonardziak*, 2 110 Pa. Super. 511, 233 A.2d 606 (1967); *Finn's Liquor Shop* v. *State Liquor Authority*, 301 N.Y.S.2d 584, 249 N.E.2d 440 (1969), *cert. den.* 396 U.S. 840 (1969); *Leogrande* v. *State Liquor Authority*, 268 N.Y.S.2d 433 (1966). The aforementioned cases are strikingly similar in nature to the instant case, and the decisions in each of those cases strongly support the reasonings adopted by the Rhode Island Supreme Court.

As *Finn* and *Leonardziak*, *supra*, noted, the facts in the *Plymouth Sedan* case, *supra*, are not that different from the Liquor Control Cases involving the license itself. In both cases, there must be a determination that the criminal law has been violated before a penalty is imposed upon the licensee. In neither situation is the State Government seeking or entitled to compensation for damages. In both cases, it is the owner or license holder that is being penalized. The Supreme Court noted that the penalty of forfeiture would be higher than the highest fine possible. In the instant case, the license holder corporation is put out of business and its principals are deprived of its income, which is potentially a greater loss than any one of a number of criminal penalties; or at least not less severe.

As *Finn*, *supra*, noted, without the exclusionary rule there would be no meaningful deterrence to protect against harassment. The State could effect parallel sanctions in an Administrative Proceeding without being concerned about the legality of the police measures that were employed to obtain evidence. The Petitioners, naturally, raised the issue that there would be no additional deterrence from excluding the evidence; however, *Finn*, *supra*, faced this question specifically and concluded that deterrence would be served if they refused to apply the exclusionary rule.

A number of State Courts as outlined *supra*, have examined, in detail, the application of the exclusionary rule in liquor license revocation proceedings, and those Courts which have passed upon this issue, have given due consideration to the question of balancing the considerations involved. On the other hand, the Petitioner has cited no case, where on the facts similar to those in the case at bar, any court has struck the balance in favor of the admissibility of the evidence.

In view of the fact that the existing case precedent in this area, cited *supra*, is clearly in favor of the exclusion of the evidence, it is important to note the rationale employed by those Courts so deciding the issue. In *Leonardziak*, *supra*, at page 608, the court offers insight into its reasons for applying the exclusionary rule in cases of this nature:

> "The purpose of the exclusionary rule is to compel respect for the constitutional guarantee in the only effectively available way by removing the incentives to disregard it. The policy of deterring unconstitutional activity by suppressing evidence would not be served if police, after being barred from using evidence against a licensee in a criminal court, could use the identical evidence to punish with equal or greater severity through the machinery of the Liquor Control Board."

The Court in *Finn*, *supra*, went on to say at page 588:

> "...the exclusionary rule rests on a theory of deterrence; that policy would not be served if the illegal official activity could be used despite unavailability in criminal proceedings to effect parallel sanctions of forfeiture in an Administrative Proceeding."

For other cases validating the application and use of the exclusionary rule in Liquor Board Administrative Hearings, see *LaPinta* v. *New York State Liquor Authority*, 294 N.Y.S.2d 947 (1968); *Malik* v. *New York State Liquor Authority*, 294 N.Y.S.2d 948 (1968); *People* v. *McGrath*, 412 N.Y.S.2d 801 (1978); and *McPherson* v. *New York City Housing Authority*, 365 N.Y.S.2d 862 (1975).

The Petitioner, in his petition, while recognizing the wealth of authority underlying the theory that the exclusionary rule is applicable to Administrative Liquor License Revocation Hearings, reasons that the holding of *Plymouth Sedan*, *supra*, is inapplicable to a proceeding involving a liquor license revocation. The Petitioner's theory, for this position, is that *Plymouth Sedan*, *supra*, addressed itself to a proceeding which was "quasi-criminal" in nature and that Rhode Island liquor license revocation matters are civil in nature. Even acknowledging that liquor license revocation proceedings are as civil in nature is correct, the Court in *Plymouth Sedan*, *supra*, defined its use of the term "quasi-criminal" in such a way as to make its holding applicable to the case at bar. On page 701 of that decision, the Court stated, "...a forfeiture proceeding is 'quasi-criminal' in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." Accordingly, even if we are to assume that liquor license revocation hearing is civil in nature, we must, nevertheless, search behind the term "civil" to glean the ultimate effect of the proceeding itself. It cannot be contradicted that an adverse ruling from the Liquor Control Administrator will, indeed, result in the forfeiture of a valuable property right,[1] and that this exacting remedy is nothing more than a penalty being imposed because of a violation of the law or of the guidelines prescribed in R.I.G.L., Section 3-5-23.

While the Petitioner acknowledges that even in jurisdictions such as New York and Pennsylvania, where liquor license revocations are considered civil in nature, the exclusionary

[1] See, *Vitterito* v. *Sportsmen's Lodge & Restaurant, Inc.*, 102 R.I. 72, 228 A.2d 119 (1967); *Beacon Restaurant, Inc.* v. *Adamo*, 103 R.I. 698, 241 A.2d 291 (1968); and *R.I. Ophthalmological Society* v. *Cannon*, 113 R.I. 16 at 24 fn. 5, 317 A.2d 124 (1974).

rule applies without equivocation. The Petitioner suggests that the Court de-emphasize the decisions of both those well-respected jurisdictions for the reason that both New York and Pennsylvania have adopted a "blanket application" of the exclusionary rule, which Petitioners allege Rhode Island has not done.

The Petitioners further suggest that the case of *United States* v. *Janis*, 428 U.S. 433 (1976), provides solace to a jurisdiction hesitant about expanding the scope of the exclusionary rule. It is submitted that petitioner's reliance upon *Janis*, *supra*, is misplaced. *Janis*, *supra*, concerned an illegal seizure of bookmaking records by the State. Because of the illegal seizure, the State could not convict Mr. Janis of a crime; however, the United States sought to obtain $4,956.00 in wagering and excise taxes from the proceeds of the bookmaking. Mr. Janis objected on the ground that the evidence on which the United States predicated its claim was illegally seized. This Court distinguished *Plymouth Sedan*, *supra*, when it held that the evidence should be admitted. However, this matter was purely civil in that the Government was only seeking its rightful share of the proceeds according to law, and there was no element of penalty involved. Simply put, the Government was getting its just due.

The Petitioner, in its brief, seems to accord great weight to the decisions of the Rhode Island Supreme Court in the cases of *State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978) and *Bridges* v. *Superior Court*, 121 R.I. 101, 366 A.2d 97 (1978), and the approach discussed in those decisions. The Rhode Island Supreme Court concluded that deterrence of the unconstitutional methods of police conduct in situations involving revocations of liquor licenses is on balance, of greater importance than the harm, if any, that would follow from the application of the exclusionary rule to such situations.

In essence, it is clearly logical that the Rhode Island Supreme Court, in using the balancing test in *Spratt* and

Bridges, *supra*, concluded that the risk of harm to society was a more important consideration than the issue of police deterrence. Obviously, the prospect of having a convicted violator escape the consequences of his actions by application of the exclusionary rule would propose a definite threat to society. In the case at bar, the failure to revoke a liquor license does not pose a similarly severe threat to the welfare of society as would the failure to revoke a person's probation or parole.

Conclusion

The decision of the Rhode Island Supreme Court in the instant case does not present an important question of Federal Law unsettled by this Court or one in conflict with applicable decisions of this Court or a case otherwise calling for the supervision of the Supreme Court of the United States. The Petition should be denied.

Respectfully submitted,

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**ON WRIT OF CERTIORARI TO
THE RHODE ISLAND SUPREME COURT**

BRIEF OF THE PETITIONER

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I.

QUESTION PRESENTED

Under what circumstances should the exclusionary rule, prohibiting as violative of the Fourth Amendment to the United States Constitution the use in a criminal trial of evidence obtained pursuant to an unlawful search and seizure (the Fourth Amendment made applicable to the states through the Fourteenth Amendment), properly be applied to exclude the admission of such evidence in a civil administrative proceeding.

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In The

Supreme Court of the United States

October Term, 1983

No. 83-963

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON,
Petitioner,

v.

LOUIS H. PASTORE, JR., in his capacity as
Liquor Control Administrator of the
State of Rhode Island and
ATTIC LOUNGE, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court in the instant case is reported at 463 A.2d 161 and appears at pages A-1 to A-10 in the Petition for Writ of Certiorari. The opinion of the Providence County Superior Court appears in the Appendix accompanying this brief at page 11.

JURISDICTION

The decision of the Rhode Island Supreme Court was rendered on July 18, 1983. The Petition for Writ of Certiorari was filed on December 13, 1983 and the Writ was issued on July 5, 1984. The Court's jurisdiction to review the decision of the Rhode Island Supreme Court by Writ of Certiorari is conferred by 28 USC Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall be not violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. The Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also relevant are Rhode Island General Laws Section 9-19-25 which appears at page A-12 in the Petition for Writ of Certiorari, Rhode Island General Laws Section 3-5-23 which appears at page A-11 in the Petition for Writ of Certiorari, and Rhode Island General Laws Section 3-12-3 which appears in the Appendix to this brief at page 54.

STATEMENT OF THE CASE

By granting Certiorari in this case, this Court has agreed to review a decision of the Rhode Island Supreme Court, which decision in turn was a review of a lower Rhode Island court decision pursuant to a Certiorari Petition requested by the Board of License Commissioners of the Town of Tiverton, Rhode Island. In Tiverton, as in other Rhode Island cities and towns, the Town Council serves as a Board of License Commissioners for the purpose of granting, renewing, suspending or terminating liquor licenses within the town. In March of 1977, Respondent, the Attic Lounge, Inc. was a licensed liquor-serving establishment within the Town of Tiverton. On March 11, 1977 several Tiverton police officers entered the Lounge pursuant to a search warrant and found stolen property (clothing) on the premises. As a result, two actions were initiated. Criminal proceedings were initiated against individuals associated with the Attic Lounge by the State of Rhode Island for possession of stolen property. At the same time, the Tiverton Town Council, acting as a Board of License Commissioners, revoked the bar's liquor license pursuant to Rhode Island General Laws Section 3-5-23 after a hearing at which evidence of the finding of the stolen property was pre-

sented. Rhode Island General Laws Section 3-5-23 provides for the revocation of a liquor license where a licenseholder permits any of the laws of the State of Rhode Island to be violated on the licensed premises. (RIGL Section 3-5-23 is recited in full at A-11 in the Appendix accompanying the Petition for Writ of Certiorari). The criminal proceedings were ultimately dismissed after a judge of the Rhode Island Superior Court (Rhode Island's criminal trial court) held that the search warrant obtained by the Tiverton police to search the Lounge was defective.

The principals of the Attic Lounge, Inc. appealed the revocation of the Lounge's liquor license to Respondent Louis H. Pastore, then Liquor Control Administrator for the State of Rhode Island. The Administrator held a de novo hearing on July 6, 1978 and received undisputed evidence that a conviction for possession of stolen property had never been obtained against any individual associated with the Lounge. The Administrator, believing that a conviction was necessary in order for a town to assert the provisions of RIGL 3-5-23, reversed the revocation of the Lounge's license and ordered that the license be reinstated.

Thereafter Petitioner filed an appeal to the Providence County Superior Court (which had statutory authority to review rulings of the Liquor Control Administrator) which affirmed the Administrator's ruling. The Superior Court held that the Administrator had erred in holding that a conviction was necessary to revoke a liquor license pursuant to RIGL Section 3-5-23. However, the Court held that because evidence of the stolen property at the Attic Lounge premises had been obtained pursuant

to a void search warrant, the exclusionary rule barred the presentation of such evidence before the Board of License Commissioners which could not therefore rely upon it in revoking the Attic Lounge's liquor license.

Petitioner then filed a Petition for Writ of Certiorari with the Rhode Island Supreme Court seeking review of the Superior Court's decision. That petition was granted by the Rhode Island Supreme Court which reviewed the Superior Court's decision and affirmed the holding that the exclusionary rule ought properly to be extended to municipal liquor license revocation proceedings.

The Rhode Island Supreme Court in its decision discussed the genesis of the exclusionary rule, (which bars the admission in a criminal trial of evidence obtained by an illegal search and seizure) in *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and its later extension to state criminal trials in *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The acceptance of this rule in Rhode Island is symbolized by the enactment by the Rhode Island General Assembly of Rhode Island General Laws Section 9-19-25 (A-12 in Appendix in Petition for Writ of Certiorari) which codifies as an evidentiary rule in criminal trials in Rhode Island the provisions of *Weeks* and *Mapp.*

The Rhode Island court admitted that it could find no decision by this Court determinative of the question of whether the exclusionary rule should be applied to administrative hearings. Its decision to extend the rule to the liquor license hearing in issue was heavily dependent on this Court's decision in *One 1958 Plymouth Sedan v. The Commonwealth of Pennsylvania,* 380 U.S. 693, 85 S.

Ct. 1246, 14 L.Ed.2d 170 (1965), which extended the exclusionary rule to a state forfeiture proceeding. The Rhode Island court also touched on this Court's ruling in *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), from which it extracted the holding that in extending the exclusionary rule past the initial criminal trial, the potential benefits of applying the rule were to be balanced against the potential for damage from such application. The Rhode Island court however was decidedly unbalanced in applying the balancing test, for it limited its consideration only to the benefits of extension, with very little discussion of the disadvantages. In effect, it held that the importance of undiluted application of the rule, in order to assure its effectiveness, rendered irrelevant discussion of any arguments mitigating against extension.

The Rhode Island Supreme Court also discussed this Court's ruling in *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), in which this Court declined to extend the exclusionary rule to civil proceedings that were inter-sovereign in nature. The Rhode Island Court however distinguished *Janis* by typifying the factual situation before it as intra-sovereign, and held that in any event, "the potential deterrent effect of the exclusionary rule on the agents of an intra-sovereign agency is strong enough to outweigh the costs to society of refusing to admit evidence obtained in violation of constitutional imperatives. [citations omitted]"[1] (Rhode

1. The Rhode Island Court noted Petitioner's argument that it had declined to extend the rule to probation revocation hear-

(Continued on next page)

Island Supreme Court decision at A-8, Petition for Writ of Certiorari.) It is interesting that the Rhode Island Supreme Court cited as support for its decision the decision of the Ninth Circuit Court of Appeals in *Lopez-Mendoza v. Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983), a decision which was overruled by this Court in its 1983-1984 term. (See *Immigration and Naturalization Service v. Lopez-Mendoza, infra.)*

SUMMARY OF ARGUMENT

This Court has on a number of occasions reviewed the issue of appropriate application of the exclusionary rule. First enunciated in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) and extended to state criminal trials in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081 (1961), the sweep of the rule has been limited by this Court in more recent years. In *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), the case which first presented this Court with the question of civil application of the rule, it was held appropriate to balance the various societal and constitutional interests affected in determining proper extension of the rule to civil proceedings; it was further held

(Continued from previous page)

ings (*State v. Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978), or to bail revocation hearings (*Bridges v. Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978).) The court's response however was to find a greater public interest in supervision over bail and probation offenders than in the proper conduct of enterprises licensed to sell and distribute alcoholic beverages.

that such extension was not appropriate in "inter-sovereign" situations.

In *Janis,* there was also some doubt expressed concerning whether and how well application of the exclusionary rule resulted in that which was its chief purpose —deterrence of police misconduct by forbidding admissability of evidence unlawfully obtained. In *Janis* and in a case recently decided by this Court—*Immigration and Naturalization Service v. Lopez-Mendoza,* 52 USLW 5190 (1984), extension of the rule was rejected where the circumstances presented by each case convinced this Court that any incremental deterrence which might result from such extension was likely to be low.

This case presents to this Court the issue of whether the exclusionary rule was properly applied to a municipal liquor license revocation hearing. Petitioner believes that the Court can decide this case in one of three ways:

1. by applying the *Janis* balancing test;

2. by refining the balancing test by establishing additional criteria (similar to the inter-sovereign rule) to aid in a determination of proper civil application of the rule;

3. by holding that civil extension is not appropriate where criminal exclusion of the unlawfully obtained evidence has already occurred.

The Court must be aware of the effect that its decision will have on law enforcement, and on the likelihood for uniformity in lower court decisions construing it. The existing balancing test, despite its attractiveness, has resulted in a disparity of results in the decisions of

lower courts applying it to the issue of civil extension of the rule. Further, the lack of predictability as to when civil application of the rule will be judicially upheld must of necessity cause law enforcement officers to be indifferent to the civil repercussions of constitutionally invalid search and seizures.

Combining the holdings of *Janice* and *Lopez-Mendoza,* Petitioner offers the following as specific additional considerations in applying the balancing test;

1. Has the evidence sought to be excluded in the civil forum already been excluded in a criminal forum?

2. Do the facts presented to the court mitigate against additional deterrence following civil exclusion? Such would be the case if:

a) the facts presented an inter-sovereign situation;

b) unique characteristics having to do with the status of the offender allow a law enforcement officer greater latitude in making an arrest or obtaining evidence, and/or allow an administrative judge greater latitude in what evidence he must have for a finding adverse to the offender. Any of the above would dilute the strong medicine of exclusion;

c) other circumstances unique to the civil hearing concerned render the deterrence value of extension of the rule low, such as the officer's unlikely ability to anticipate that any civil hearing will result from the evidence he seeks to obtain of criminal behavior.

The Court must then consider the social costs of civil exclusion. Petitioner believes that the price is too high where society must absorb not only the cost of foregoing criminal prosecution, but the duty as well of revoking a license or other privilege extended to a holder, retention of which is contingent on good behavior.

The Court finally has the option of rejecting further civil exclusion of tainted evidence where criminal exclusion has already occurred. Such a decision would no doubt be in recognition of the judicially expressed skepticism of the exclusionary rule's deterrence of police misconduct, and could reflect as well the belief that police officers — who function primarily as agents for the detection of violations of the criminal code — are not greatly influenced by the civil consequences of their misbehavior.

Petitioner believes that application of any of the three preceding tests by this Court would justify reversal of the decision being reviewed. This would of course be true if this Court opted to foreclose civil exclusion of evidence where criminal exclusion had already occurred.

Application of the *Janis* balancing test (which *Lopez-Mendoza* has rendered applicable to intra-sovereign situations) should also result in reversal. The liquor license hearing room was outside the zone of primary interest for the Tiverton police officers searching the Attic Lounge. They had secured a warrant to search for stolen goods and were acting as agents of the State of Rhode Island in its enforcement of its criminal code when they did so. Unlike the officers in *Lopez-Mendoza,* who searched for evidence and made arrests especially for presentation to a civil deportation hearing, Tiverton's

police officers were functioning as enforcement officers of the State's criminal code. There is little further deterrence to be gained from additional exclusion of the evidence they obtained.

As in *Lopez-Mendoza,* there are circumstances unique to liquor license control which argue against civil application of the exclusionary rule to revocation hearings in Rhode Island, and no doubt in numerous other states as well. Police officers, by state statute, have free access to licensed establishments to maintain order and to ascertain that no laws are being violated. With such free access, officers who suffer the exclusion of evidence obtained under color of a warrant later held invalid, will simply eschew entering licensed establishments in the manner associated with criminal searches, and will instead enter pursuant to the access given them by the state licensing laws.

Whichever balancing test is applied, Petitioner believes that social concerns, given short shrift by the lower court, dictate reversal. Licensed liquor-serving establishments, by virtue of their nature, have traditionally and appropriately been subject to tight local regulation. Such regulation includes amenability to police inspection at all times. This policy of free access by authorities to licensed liquor-serving establishments represents a societal concern which deserves to outweigh any additional deterrence which might come from subjecting liquor license revocation hearings to the evidentiary limitations of the exclusionary rule.

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ARGUMENT

I. The Exclusionary Rule ought not to be extended to a Liquor License Revocation Hearing to exclude evidence, relevant to the license proceeding, which has already been suppressed in a criminal forum.

A. Recent decisions of this Court have reversed an earlier trend toward expansive application of the exclusionary rule.

1. Earlier decisions of this Court expanded use of the rule.

The exclusionary rule bars the use in an adversarial proceeding of evidence obtained by a law enforcement officer by illegal means. The exclusionary rule has been controversial since its enunciation in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). Initially applicable only to federal criminal trials, its extension to state criminal proceedings in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081 (1961) multiplied its application to state courts in fifty jurisdictions and, in the opinion of its critics, compelled law enforcement officers to be students of search and seizure law. The chief purpose of the rule, as stated by Mr. Justice Stewart in *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1169 (1960) is apparently now established as preventative: "Its purpose is to deter — to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it." 364 U.S. 206 at 217, 80 S.Ct. 1437 at 1444.[2]

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2. Justice Brennan, dissenting in *United States v. Calandra, supra* disagreed, holding the chief purpose of the rule to be "enabling the judiciary to avoid the taint of partnership in official lawlessness," and "assuring the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." 414 U.S. at 357, 94 S.Ct. at 624.

Appropriate extension of the rule has been a frequent issue for this Court to resolve. In the first years following *Mapp*, resolution of this issue was usually in favor of extension. *Elkins* extended the rule to evidence obtained illegally by state authorities which was offered for use in a federal criminal proceeding. *Mapp* of course extended the rule to all state criminal proceedings. In 1965, in a ruling relevant to the question now before the Court, this Court held the rule dictated exclusion, in a civil forfeiture proceeding, of unlawfully obtained evidence. See *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 694, 85 S.Ct. 1246, 14 L.Ed.2d 170. Such non-criminal extension is justified by the Court to a proceeding civil in form, but deemed criminal in nature, in that the purpose of such a proceeding was forfeiture of a man's property by reason of prior criminal offenses. 380 U.S. at 697, 85 S.Ct. at 1249.[3]

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3. The court's ruling was dependent in large part on its earlier ruling in *Boyd vs. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, (1886), a ruling which pre-dated the enunciation of the exclusionary rule in *Weeks*. The *Boyd* court, examining a proceeding by the United States to forfeit goods which had allegedly been imported without payment of a customs duty, held that the government could not seize evidence in violation of the Fourth Amendment for use in a forfeiture proceeding. Held the *Boyd* Court:

> We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal . . . If the government prosecutor elects to waive an indictment and to file a civil information against the claimants—that is civil in form—can he by this device take from the proceedings its criminal aspect and deprive the claimants of their immunities as citizens . . .? This cannot be. The information, though technically a civil proceeding is in substance and effect a criminal one. 116 U.S. at 633-634, 6 S.Ct. at 534.

2. More recent decisions have balanced competing interests and limited application of the rule.

More recent decisions of this Court however, have seen fit to limit criminal application of the rule where the benefits of extension were found to be outweighed by the risks. Thus the exclusionary rule's sweep has been held not to include grand jury hearings *(United States v. Calandra, supra),* or federal habeas corpus proceedings *(Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)), or to bar the use of unlawfully obtained evidence to impeach the credibility of a criminal Defendant *(Walder v. United States,* 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed.2d 503 (1954)). In each of these decisions, defining the use of the rule in the criminal arena, the Court has balanced the interest of deterrence of unconstitutional police behavior against the potential imposition on criminal procedures and has determined that societal interests were best served by not extending the exclusionary rule to the proceeding in issue.

In 1976, in *United States v. Janis,* 428 US 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046, this Court stepped away from the inflexible "quasi-criminal" test of *Plymouth Sedan,* and applied the balancing test to a civil tax assessment proceeding. Although the taxing authority was the Internal Revenue Service, the evidence sought to be introduced at its forum had been illegally obtained by Los Angeles police officers. This Court, in a decision which gave rise to the "inter-sovereign rule", held admissible evidence at a civil proceeding of one sovereign which had been unlawfully obtained by a criminal law enforcement agent of another sovereign.

3. Janis and Lopez-Mendoza reflect concern over when and if deterrence really occurs.

The *Janis* "inter-sovereign" exception resulted in no small part from the lack, as stated in Mr. Justice Blackmun's decision, of empirical proof that the exclusionary rule actually discourages unlawful searches.[4] With such uncertainty about the effectiveness of excluding tainted evidence from criminal proceedings, the *Janis* court was prepared to decide that there was likely to be no deterrence to constabulary misconduct justifying the exclusion of such evidence in "inter-sovereign" civil situations. Mr. Justice Blackmun commented in his opinion in *Janis:*

> If the exclusionary rule is the "strong medicine" that its proponents claim it to be, then its use in the situations in which it is now applied (resulting, for example, in this case in frustration of the Los Angeles police officers' good-faith duties as enforcers of the criminal laws) must be assumed to be a substantial and efficient deterrent. Assuming this efficacy, the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted. Under either assumption, therefore, the extension of the rule is unjustified. 428 U.S. at 454-455, 86 S.Ct. at 3032.

The Court distinguished its ruling in *Janis* from its ruling sixteen years previous in *Elkins:*

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4. In fact, Justice Blackmun cited a number of criteria which would render difficult, if not impossible, the achievement of any conclusive statement, based on empirical data, as to the actual deterrent effect of the rule. 428 U.S. at 453, 96 S.Ct. at 3021.

In *Elkins* the Court indicated that the assumed interest of criminal law enforcement officers in the criminal proceedings of another sovereign counterbalanced this attenuation sufficiently to justify an exclusionary rule. Here, however, the attenuation is further augmented by the fact that the proceeding is one to enforce only the civil law of the other sovereign.

This attenuation, coupled with the existing deterrence effected by the denial of use of the evidence by either sovereign in the criminal trial with which the searching officer is concerned, creates a situation in which the imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest. The extension of the exclusionary rule, in our view, would be an unjustifiably drastic action by the courts in the pursuit of what is an undesired and undesirable supervisory role over police officers. 428 US at 458, 96 S.Ct. at 3034.

The most recent holding by this Court relevant to the issue at bar is the decision authored by Justice O'Connor in *Immigration and Naturalization Service v. Lopez-Mendoza et als,* 52 USLW 5190 (1984). *Lopez-Mendoza* called upon this Court to determine whether evidence of an unlawful arrest of one Mexican alien and evidence of an admission resulting from an unlawful arrest of a second Mexican alien should have been suppressed at deportation proceedings held under the auspices of the Immigration and Naturalization Service before an Immigration Judge. This Court answered both questions in the negative, depending heavily upon the balancing test criteria it had enunciated in *Janis.*

Justice O'Connor pointed out that a deportation proceeding is a purely civil action to determine the eligibility

of an alien to remain in the United States; rather than punishing an unlawful entry by fine or imprisonment, the deportation proceeding looks prospectively to an alien's right to remain in this country. Evidence of past criminal conduct of the alien (such as illegal entry or other criminal conduct) is relevant only insofar as such conduct may shed light on the alien's right to remain. The Court admitted that the deterrent value of applying the exclusionary rule in deportation proceedings might be higher than it was in the proceeding under review in *Janis;* the Court also believed it to be quite clear that the social costs would be much greater as well. While also admitting that the *Lopez-Mendoza* proceeding represented an "intra-sovereign" violation, (in which the allegedly offending immigration officer was employed by the sovereign which officiated at the civil forum in which the tainted evidence was sought to be presented) the Court, applying the *Janis* balancing test, reached a determination of non-application of the exclusionary rule for the following reasons:

1. Regardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation.

2. Very few deportees challenge the circumstances of their arrest. When an occasional challenge is brought, the consequences from the point of view of the immigration officer's overall arrest and deportation record will be trivial. In these circumstances the arresting officer is less likely to shape his conduct in anticipation of the exclusion of evidence in a formal deportation hearing.

3. The INS possesses its own comprehensive scheme for deterring Fourth Amendment violations by its officers.

4. Any deterrent value of extending the exclusionary rule to deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights.

The Court then enumerated a number of societal interests mitigating against extension of the exclusionary rule to deportation hearings. Most important was the Court's concern that application of the exclusionary rule to deportation hearings would compel the immigration courts to release from custody persons who would then immediately resume their commission of a crime through their continuing unlawful presence within the United States.

B. In ruling on case at bar, Court can apply Janis, refine Janis, or decline to extend rule where evidence previously excluded.

A consistent concern in *Janis, Calandra* and *Lopez-Mendoza* is this court's reluctance to extend the exclusionary rule's application where there is doubt about whether any increased deterrence to police misconduct will follow. This Court in *Janis* has already declined to extend the rule beyond the law enforcement officer's zone of interest and has determined that inter-sovereign administrative hearings are beyond that zone. In *Lopez-Mendoza,* this Court declined extension even in the closest of intra-sovereign situations where circumstances unique to immigration procedures mitigated against the likelihood of deterrence.

In deciding the case before it, this court can proceed in one of three ways:

i. the Court can apply the balancing test of *Calandra* and *Janis* to the facts presented by this appeal;

ii. the Court can refine the balancing test beyond *Janis* by identifying other general considerations, whether in the deterrence category or in the societal interest category, which would dictate extension or non-extension of the rule to civil proceedings. Such a refined balancing test would then be applied to the facts of this case;

iii. the Court can hold that the exclusionary rule shall not be applied to "intra-sovereign" civil proceedings to exclude evidence which has already been excluded in a criminal proceeding.

1. Legacy of Janis and balancing test.

In deciding which option to choose, this Court should consider the impact of each option upon law enforcement and should be concerned as well with fashioning a precedent which will be evenly applied by the lower courts. The *Calandra-Janis* "balancing test" is, at least theoretically the fairest method, but creates the following problems for law enforcement and as precedent:

a. Since 1974, there has been a great disparity of results between liberal and conservative jurisdictions in their application of the balancing test to the issue of civil application of the exclusionary rule;

b. The resulting lack of predictability as to when and where the rule will be applied civilly assures a de facto

attenuation of any deterrent effect which the rule may have. If law enforcement officers cannot predict how sweeping will be the exclusion of evidence they might obtain unlawfully past the criminal proceeding proper, it seems likely that they will act, and may be entitled to act, in total disregard of the possibility that such evidence may be excluded in more than just the initial criminal forum. As this Court stated in *United States v. Peltier,* 422 U.S. 531 at 539, 95 S.Ct. 2313 at 2318, 45 L.Ed.2d 374 (1975) (quoting from *Michigan v. Tucker,* 417 U.S. at 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182, (1974):

> The deterrent effect of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the Defendant of some right.

The *Peltier* court continued:

> If the purpose of the exclusionary rule is to deter unlawful police misconduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. 422 U.S. at 542, 955 S.Ct. at 2320.

This argument assumes that there is no deterrence where there is no foreseeability. Just as a police officer will not be deterred from conduct which he does not know is wrong, so he will similarly not be deterred where he cannot reasonably foresee all of the consequences of any misconduct.

Illustrative of the divergent results that can result from the balancing test are the Rhode Island Supreme Court decision under review and the decision of the California Supreme Court in *Emslie v. State Bar of Califor-*

nia, 11 Cal.3d 210, 113 Cal.Rptr. 175, 520 P.2d 991 (1974).[5] The Rhode Island decision does not really balance competing interests, but after citing *Calandra,* relies on decisions in New York and Pennsylvania *(Finn's Liquor Shop v. State Liquor Authority,* 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584, cert, denied, 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969) and *Pennsylvania Liquor Control Board v. Leonardziak,* 210 Pa.Super. 511, 233 A2d 606 (1967)—both of which pre-date *Calandra)* which hold that the sweep of the exclusionary rule must not be limited only to criminal proceedings or its deterrent influence will be threatened.

In *Emslie* on the other hand, the California Supreme Court declined extension of the exclusionary rule to disbarment proceedings of an attorney accused of criminal conduct. The *Emslie* Court did not rely on *Calandra,* but on two of its own earlier decisions which anticipated the balancing test: *People v. Moore,* 69 Cal.2d 674, 72 Cal. Rptr. 800, 446 P.2d 800 (1968) and *In Re Martinez,* 1 Cal. 3d 641, 83 Cal.Rptr. 382, 463 P.2d 734 (1970). The Court found no deterrent effect in extending the exclusionary rule to attorney disciplinary proceedings, and while declining to say that such disciplinary proceedings could never be subject to the confines of the rule, held that the

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5. See also Andreoli, "Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings: Focusing on Motive to Determine Deterrence" 51 Fordham Law Review 1019 (1982-83) for a summary of the diverging results achieved by lower courts applying the *Janis* balancing test, and the *Plymouth Sedan* quasi-criminal test as well, to the issue of civil exclusion of evidence.

protection of the courts and integrity of the legal profession, dictated non-extension in the case before it.[6]

The closest this Court has come to establishing guidelines for civil application of the exclusionary rule was in *Janis*. Lower courts however have felt free to distinguish *Janis* from many of the most frequent civil exclusionary rule issues brought before them due to the confinement of the *Janis* ruling to "inter-sovereign" situations. Recently in

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6. The State of California presents a text book example of mixed civil application of the exclusionary rule. In *People vs. One 1960 Cadillac Coupe*, 62 Cal.2d 92, 41 Cal.Rptr. 290, 396 P.2d 706 (1964), the California Supreme Court sanctioned the use of the exclusionary rule in a civil proceeding for forfeiture of a car used in unlawful transportation of marijuana, holding: "whatever the label which may be attached to the proceeding, it is apparent that there is a close identity to the aims and objectives of criminal law enforcement. On policy, the same exclusionary rules should apply to improper state conduct, whether the proceeding contemplates the deprivation of one's liberty or property." 62 Cal.2d at 96-97, 41 Cal.Rptr. at 293, 396 P.2d at 709. In *People v. Moore, supra*, a similarly close identity was found between a civil narcotic addict committment proceeding and the aims and objectives of criminal law enforcement and the exclusionary rule was held applicable to such a civil proceeding as well. In *In Re Martinez, supra*, concerning a parole revocation proceeding, the California Supreme Court also found identity between the revocation proceedings and the aims and objectives of criminal law enforcement, but found practically no deterrent effect to be anticipated by application of the exclusionary rule to that proceeding. A lower California district court of appeals decision in *Governing Board, Mountainview School District v. Metcalf*, 36 Cal.App.3d 546, 111 Cal.Rptr. 724 (D.Ct.App. 1974) held the exclusionary rule inapplicable to a teacher's disciplinary hearing. The exclusionary rule was recently held applicable to a Department of Motor Vehicles hearing involving misuse of Department vehicles in *Taylor Bus Service v. Doris Alexis as Director of the Department of Motor Vehicles, State of California* (slip opinion—May 14, 1984) California Court of Appeal, Fourth Appellate District, Division Three.

Lopez-Mendoza, this Court has indicated that such confinement may not be appropriate.

2. Possible Refinement of Janis.

While the value of *Lopez-Mendoza* as precedent is limited because of its partial dependency on some special features of immigration procedure, it may be possible to fashion some additional criteria for determining the appropriateness of civil extension of the exclusionary rule from *Janis* and *Lopez-Mendoza* combined. Non-application would follow, for instance in the presence of the following factors:

a. the evidence has already been excluded in an earlier criminal proceeding;

b. further exclusion would not be likely to deter police misconduct if the second, civil, hearing were beyond the offending officer's zone of primary interest. Such would be assumed to be the case:

i. in inter-sovereign situations;

ii. unique characteristics having to do with the status of the offender allow a law enforcement officer greater latitude in making an arrest or obtaining evidence, and/or allow an administrative judge greater latitude in what evidence he must have for a finding adverse to the offender. Any of the above would dilute the strong medicine of exclusion;

iii. other circumstances unique to the civil hearing concerned render the deterrence value of extension of the rule low, such as the officer's unlikely ability to anticipate that any civil hearing

will result from the evidence he seeks to obtain of criminal behavior.[7]

Such an evaluation must include consideration of the social costs of application, and when such costs will be deemed too high. One relevant consideration would certainly be whether society should have to pay the double cost of foregoing not only a criminal prosecution but the duty as well of revoking a license or other privilege extended to a holder, retention of which is contingent on good behavior.[8]

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7. This approach has met with approval in California (*People v. Moore, supra)* and in the Second Circuit *(Tirado v. Commissioner,* 689 F.2d 307 (2d Cir. 1982)) which focus in detail on the relationship—formal or informal—between the seizing official and the proponent of the evidence at the subsequent civil proceeding.

8. To paraphrase two quotes mentioned by Mr. Justice Stewart in *Elkins v. United States, supra:* Ought the criminal not only to go free but as well to continue with remunerative activity licensed and therefore blessed by society because the Constable has blundered? Or to paraphrase certain words of Professor Wigmore: "Titus, you have been found guilty of conducting a lottery in your cocktail lounge which you operate with the good graces and pursuant to a license bestowed upon you by the City. Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment and loss of said license for crime and Flavius for contempt. But no, we shall let you *both* go free—we shall not punish Flavius directly but shall do so by reversing Titus' conviction and by preventing the City from striking Titus' cocktail lounge from its list of licensed law-abiding liquor serving establishments. This is our way of teaching people like Flavius to behave and of teaching people like Titus to behave, and incidently of securing respect for the Constitution. Our way of withholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else. (paraphrase of 8 Wigmore, Evidence (3d ed. 1940)) Section 2184 at 364 U.S. at 217, 80 S.Ct. at 1444.

3. Option of no civil exclusion where criminal exclusion has already occurred.

The final option would be for this court to decline to extend the exclusionary rule to any civil proceeding where tainted evidence sought to be introduced has already been excluded from use in a criminal prosecution. This Court indicated in *Janis* a strong skepticism concerning the efficacy of the exclusionary rule in a forum "outside of the offending officer's zone of primary interest". 428 U.S. at 457, 96 S.Ct. at 3034. In most occasions where a law enforcement officer would be tempted to exceed the bounds of constitutionally proper search and seizure, the temptation is stimulated by the hope of a resulting criminal arrest. There may be little consideration that such an arrest might also subject his suspect to a civil penalty, even though the penalizing authority might be in some way "related" to the offending officer. In many cases such officers do not even know that their suspect would be subject to such a civil penalty.[9] To take *United States v. Janis* one step further, if the exclusionary rule is the "strong medicine" that its proponents claim it to be, then perhaps that "strong medicine" is most effectively administered by limiting the dosage to criminal hearings — and by not protracting the dosage where criminal application has already occurred.

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9. As the California Appellate Court for the Second District commented in *Governing Board v. Metcalf, supra:* "The police in making investigation of suspected criminal activity are, we surmise, generally completely unaware of any consequences of success in their investigative efforts other than the subsequent criminal prosecution of the suspected offender. 36 Cal. App.3d at 549, 111 Cal.Rptr. at 726.

The effect as precedent of further refinement of the balancing test or limitation of the exclusionary rule to criminal hearings should be greater uniformity in how lower courts deal with this issue. Regarding the effect of either option on law enforcement procedures, hopefully this Court would not chose an alternative that negated away deterrent effect upon improper search and seizure which criminal exclusion of improperly obtained evidence now has. Petitioner believes that clarification of the question of when the rule is or is not to be civilly applied must naturally improve the likelihood of deterrence when civil exclusion is called for.

C. Application of any of three tests would dictate reversal of the Rhode Island Supreme Court's decision below.

Petitioner believes that application of any of the three preceding tests by this Court to the facts presented by this appeal would justify a reversal of the Rhode Island Supreme Court's decision. This would obviously be true if this Court rendered an opinion foreclosing the application of the exclusionary rule to exclude from administrative hearings evidence which had already been suppressed in a criminal forum. Petitioner believes however that application of the *Janis* "balancing test" (as modified by *Lopez-Mendoza* to apply to intra-sovereign situations) would also lead to reversal.

1. Balancing interests in Case at bar would result in non-application of rule.

As previously mentioned, the Rhode Island Supreme Court did not really balance the competing interests that

pertain to the issue of extension of the exclusionary rule to liquor revocation hearings, but only asserted the importance of preserving the deterrent benefits of the rule by ensuring that unlawfully obtained evidence not be used in either a criminal proceeding, or subsequent administrative hearing. After citing earlier New York and Pennsylvania cases which supported application of the rule to liquor license hearings, the Rhode Island Court held that for reasons of deterrence: "it is certainly appropriate to apply the exclusionary rule in administrative proceedings when the police have searched premises known to be licensed for the sale of liquor and have turned over the fruits of the search to the administrative agency empowered to revoke the license." (Decision of Rhode Island Supreme Court, at A-6, Petition for Writ of Certiorari).

In its concern to protect the exclusionary rule from any erosion in Rhode Island by such a limitation, the Rhode Island court did not analyze whether in fact extension of the rule to liquor license hearings would have any incremental deterrent effect. This Court in *Janis* held that such a deterrent effect was unlikely, or at least severely attenuated, in "inter-sovereign" civil hearing situations, situations which fall outside a law enforcement officer's zone of primary interest.

Such attenuation could be argued to apply to the facts at bar, even though such facts do not qualify this case for "inter-sovereign" treatment. The Town of Tiverton admittedly employed the police officers who, in reliance on an insufficient warrant, searched for and found stolen goods on the premises of the Attic Lounge. The purpose

of that warrant was to permit access to the Lounge in order to determine whether stolen goods were being concealed there in violation of Rhode Island General Laws Section 11-41-2, which prohibits and establishes penalties for the possession of stolen items.[10] In this respect the Tiverton police officers, in seeking access to the Lounge, were acting as agents of the Attorney General of the State of Rhode Island, which is the sole enforcement authority for felony violations of the Rhode Island General Laws.[11] Their zone of primary interest was detection of state criminal law violations - as such the deterrent effects of the exclusionary rule should have been satisfied when this goal was thwarted by inadmissibility of evidence of the stolen goods at the subsequent state criminal proceeding.

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10. RIGL 11-41-2. Receiving stolen goods.—Every person who shall fraudulently receive any stolen money, goods, securities, chattels or other property, knowing the same to be stolen, shall be deemed guilty of larceny, although the person who stole the same may not have been prosecuted or convicted therefor; and the possession of any such stolen property shall be evidence of guilty knowledge by the person having such possession that such property was stolen, except such person shows that it was acquired in the due course of trade and for adequate consideration.

11. RIGL 42-9-3. Attendance on general assembly and court —Information on criminal matters.—The attorney general shall give his attendance at the general assembly, and at the Supreme and Superior Courts, for the service thereof; and shall give unto the said courts due advice and information concerning any criminal matters, breaches of the peace, or wrong done to the state or any of the citizens thereof, that shall come to his knowledge.

RIGL 42-9-4. Prosecution of offenses.—He shall draw and present all informations and indictments, or other legal or equitable process, against any offenders, as by law required, and diligently, by a due course of law or equity, prosecute the same to final judgment and execution.

This Court held in *Lopez-Mendoza* that even where a civil proceeding represents a civil complement to a possible criminal prosecution, and even where the offending officer's relationship to the sovereign controlling the civil proceeding is definitely "intra-sovereign", extension of the exclusionary rule is not called for where the incremental deterrence effect is suspected to be low. For reasons just previously stated, Petitioner believes such to be the case here. Unlike the immigration officers in *Lopez-Mendoza,* who made arrests and gathered evidence specifically for civil deportation hearings, Tiverton's police officers, in securing a warrant to search the Attic Lounge, were acting toward a goal of criminal prosecution.[12] Unlike the officers in *Lopez-Mendoza,* they had already seen that goal frustrated by suppression of the evidence which they obtained as a result of that search and dismissal of criminal actions filed against principals of the Lounge.

2. Additional factors mandate non-application.

Petitioner believes that application of the *Janis* balancing test together with consideration of the other additional criteria suggested by Petitioner earlier in this brief would clearly mandate reversal of the Rhode Island Supreme Court's decision. The allegedly tainted evidence seized at the Lounge has already been excluded in the criminal forum. Such initial exclusion having occurred, Pe'titioner believes that further exclusion in this case would

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12. As will be discussed later, they did not need a warrant to search the Lounge for liquor license violations.

be unlikely to deter police misconduct for the following reasons:

a. As previously argued, liquor license revocation hearings are beyond the zone of primary interest of a policeman whose chief concern is the enforcement of local or state criminal codes — in this case, the Tiverton police secured the warrant which was later found defective in order to search the Lounge for violations of Rhode Island General Laws Section 11-41-2, not for liquor license violations.

b. In addition, the strong medicine of the constitutional limitations of the exclusionary rule is diluted in Rhode Island and in most other states by statutes which in effect authorize warrantless searches of licensed liquor serving establishments in order to ascertain that licensing laws are not being violated and that order is being preserved. In Rhode Island that statute is Rhode Island General Laws Section 3-12-3 (page 54, Appendix to brief), which provides that municipal officials (which may include local police officers) may enter the premises of licensed liquor serving establishments "to ascertain the manner in which such person conducts his business and to preserve order." As the Rhode Island Supreme Court admitted in its decision at (A-10 Petition for Writ of Certiorari): "These statutes allow a right of access to licensed premises for the purpose of enforcing those statutes and regulations that relate to the conduct of licensed liquor establishments. Obviously while such officers are properly upon the premises, they may act appropriately in respect to any violations of law that are committed in their presence, or may act in respect to any evidence that

may properly be within plain view. See *Texas v. Brown* 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *Coolidge v. New Hampshire,* 403 US 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)." Municipal officers or police officers legitimately upon the premises of a licensed liquor-serving establishment pursuant to RIGL Section 3-12-3 will be checking for violations of license regulations and may also check for violations of any of the laws of the State of Rhode Island. Discovery of any such violation, pursuant to RIGL Section 3-5-23 at (A-11 Petition for Writ of Certiorari), is sufficient grounds for license revocation, even in the absence of a criminal conviction for such violation.

Petitioner raised this argument with the Rhode Island Supreme Court which responded to it at (A-10 Petition for Writ of Certiorari) by stating that it was not confronted with the question of the propriety of the search and seizure allegedly conducted by the Tiverton police officers — that where such officers had seen fit, for whatever reasons, to enter the Attic Lounge by virtue of a search warrant rather than pursuant to Rhode Island General Laws Section 3-12-3, that the Court would not consider, for purposes of the issue of proper extension of the exclusionary rule, whether the officers had a right to be on the premises in any event, invalid warrant or not. Certainly however, this Court should find it extremely relevant, in its determination of how much deterrence is to be gained by extending the rule to such hearings, that the offending officers are by state statute, and by the fact of the concerned establishment being licensed by the state, not bound by the usual constitutional restrictions on search and seizure. What incremental deterrence

could possibly result in these circumstances? If application of the rule to liquor revocation hearings were affirmed, police officers in the State of Rhode Island will resort to the authority of Rhode Island General Laws Section 3-12-3 to enter establishments where criminal activity is suspected, rather than chancing entry on a possibly deficient warrant. The existence of such statutory authority also answers th argument that the officers, knowing they were in a licensed establishment, could reasonably anticipate that a license revocation might follow from their actions. Any possible deterrence to illegal conduct which might follow from an awareness that tainted evidence would be excluded from a subsequent license hearing is negated by a corresponding awareness of their special rights of entry to licensed premises afforded by RIGL Section 3-12-3.

3. Relevant social concerns dictate non-application.

Finally, there are the social concerns inherent in proper regulation of licensed liquor establishments. Although the Rhode Island Court did not give great weight to this important governmental function, the Illinois Supreme Court did in *Daley v. Berznaskis,* 47 Ill.2d 395, 269 NE2d 716 (1971). Said the Illinois Court:

> We consider first whether authorization for a warrantless search is constitutional. "Like other courts, this Court has often held that because of its nature the right to engage in the liquor trade is not an inherent one but is subject to regulation by the state in the exercise of its police power." [citations omitted] The Court, in *People ex rel. Fitzgerald v. Harrison,* 256 Ill. 102, 99 N E. 903 noted: "The business of selling intoxicating liquor is attended with danger to the community and is a recognized subject for regulation by the police power of the state. There is no inherent right to carry it on and it may be entirely prohibited. The manner and extent of its regulation, if permitted to be carried on at all, are to be determined by the state, so as to limit, as far as possible, the evils arising from it." (256 Ill. at 106, 99 N.E. at 904.) Because the business of selling liquor is closely related to certain evils in society, it is subject to any regulation which has any substantial relation to the public health, comfort, safety or welfare. "It is axiomatic that the legislative judgment as to what the public welfare requires its not open to judicial dispute so long as that judgment is not exercised in such an arbitrary, oppressive and unreasonable manner as to constitute a deprivation of due process of law. The legislature's discretion is broad, and its determinations may not be overturned because a court may think them unwise or inappropriate." (44 Ill.2d at 158, 254 N.E.2d at 504.) Considering the nature of the business we do not believe that a close scrutiny of the operation of the business through warrantless searches is unreasonable or arbitrary. 269 N.E.2d at 718 through 719

The *Daley* Court continued:

> We agree with the Ohio court [referring to *Soloman v. Liquor Control Commission,* 7 Ohio St.2d 31, 212 NE2d 595, cert. denied (1966) 384 U.S. 928, 86 S. Ct. 1445, 16 L.Ed.2d 531] that one who applies for and is issued a permit to sell alcoholic beverages thereby assents to the reasonable and lawful conditions imposed by statute and rule and find that due to the potentiality of criminal activity in the liquor business, there is no constitutional objection to requiring consent to a warrantless search as a pre-requisite to the issuance of a liquor license. The State of Illinois could completely prohibit the sale of liquor, but having instead chosen to regulate it, any restriction or

> requirement such as consent to a warrantless search which is necessary to protect public health, safety and morals is a reasonable exercise of the police power of the state. [citations omitted] 269 N.E.2d at 719

The Rhode Island Supreme Court itself recently quoted with approval from its earlier decision in *Di Traglia v. Daneker*, 83 R.I. 227, 230, 115 A2d 345, 347 (1955):

> The public has a vital and continuing interest in the control and supervision of the liquor traffic. Therefore the business of selling beverages, if permitted at all, is clearly and completely subject to the police power of the state in order that the health, morals and safety of the people generally may be protected against the evils of intemperance. In the exercise of that power, the state may impose restrictions and burdens, however great, which the legislature may deem advisable to prescribe so long as such provisions are not discriminatory or inconsistent with federal or state constitutional requirements. See *28 Prospect Hill Street, Inc. v. Gaines*, — R.I. — 461 A2d 923 (1983).

Also applicable to the case at bar is the distinction made by this Court in *Lopez-Mendoza* between proceedings which penalize prior misconduct of a complaining respondent, and proceedings which are more prospective in nature. In *Lopez-Mendoza* a deportation proceeding was defined in purpose a purely civil action to determine eligibility of an alien to remain in this country, not to punish an unlawful entry. Though entering and remaining unlawfully in the United States is itself a crime, any such past conduct is relevant in a deportation hearing only insofar as it might shed light on the respondent's right to remain here. Similarly, a liquor license revocation proceeding is a civil action to determine eligibility to continue to retain a liquor license, retention of which is as

much of a privilege to the holder as legal residency in the United States is to an alien. Liquor license revocation proceedings as well look prospectively to the holder's right to continue to retain such a license, with past conduct of the licensed activities being relevant only insofar as it may shed light on the holder's right to continue to claim the privilege of being a licensed server of alcoholic beverages.

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CONCLUSION

In conclusion, Petitioner would renew the request initially made in its Petition for Writ of Certiorari for further definition of the appropriate test to be applied in a determination of when the exclusionary rule ought, or ought not, to be applied to civil or administrative proceedings. Petitioner would also request that this Court clarify the existing status as citable precedent of the *One 1958 Plymouth Sedan* "quasi-criminal" ruling which has not been relied upon by this Court in its recent rulings on this issue, but which has not been distinguished or overruled. It continues to be a decision however upon which many lower courts rely in holding for application of the exclusionary rule to administration hearings such as the one at bar.

Petitioner believes that it is entitled to prevail under any of the three preceding tests suggested for review of the Rhode Island Supreme Court's decision. The Tiverton police officers who searched the Attic Lounge have already suffered the discomfort, and possibly also the professional discredit, of suppression of the results of

that search in the criminal proceeding against the officers of the Lounge. The cause of deterrence has therefore already been served. Petitioner believes that, contrary to the conclusion reached by the Rhode Island Supreme Court, any interest served by further extension of the exclusionary rule is not of the same significance as the social interest served by effective control over liquor-serving establishments. Whether this Court applies the *Janis* balancing test or any derivative thereof, or chooses a more arbitrary standard, review of the decision below ought to result in its reversal.

Petitioner therefore respectfully requests that the decision of the Rhode Island Supreme Court be reversed, and that this Court hold the exclusionary rule to have been improperly applied to the Attic Lounge liquor license revocation proceedings before the Tiverton Board of License Commissioners.

Respectively submitted,

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No. 83-963

In The

Supreme Court of the United States

October Term, 1983

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON,

Petitioner,

vs.

LOUIS H. PASTORE, JR., in his capacity as
Liquor Control Administrator of the
State of Rhode Island and
ATTIC LOUNGE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

1977

March 11 Tiverton police raid Attic Lounge pursuant to search warrant later held invalid by Newport County Superior Court, and discover stolen goods on premises.

March 28 Tiverton Town Council, sitting as Board of License Commissioners, revokes BV liquor license of Attic Lounge due to existence of stolen goods on premises.

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

DEPARTMENT OF BUSINESS REGULATION
LIQUOR CONTROL ADMINISTRATION

ATTIC LOUNGE, INC.
d/b/a CABARET
469 MAIN ROAD
TIVERTON

vs.

BOARD OF LICENSE COMMISSIONERS
TOWN OF TIVERTON

1977

April 6 Attic Lounge files appeal from revocation of liquor license to Rhode Island Liquor Control Administrator.

1978

July 6 Hearing before Rhode Island Liquor Control Administrator Louise Pastore re appeal of Attic Lounge from license revocation by Tiverton Board of License Commissioners. At said hearing, evidence presented that criminal charges pending against officers of Attic Lounge dismissed because of court holding that search warrant relied upon by Tiverton police was defective.

August 3 Decision of Rhode Island Liquor Control Administrator overturns Attic Lounge's license revocation on the ground that because no convictions resulted from finding of stolen goods on the Attic Lounge premises, that no license revocation could occur pursuant to RIGL 3-5-23.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

SUPERIOR COURT

PROVIDENCE, Sc.

C.A. NO. 78-2659

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON

vs.

LOUIS H. PASTORE, JR., in his capacity as Liquor Control Administrator and ATTIC LOUNGE, INC.

1978

Sept. 1 Complaint filed in Providence County Superior Court by Tiverton Board of License Commissioners appealing the decision of the Rhode Island Liquor Control Administrator.

1980

August 6 Decision filed by Providence County Superior Court, Justice Corrine Grande, affirming decision of Liquor Control Administrator on the ground that the exclusionary rule barred the Tiverton Board of License Commissioners from revoking Attic Lounge license on the basis of evidence obtained by illegal warrant.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

SUPREME COURT

PROVIDENCE, Sc.

No. 80-426 M.P.

BOARD OF LICENSE COMMISSIONERS OF THE
TOWN OF TIVERTON

vs.

LOUIS H. PASTORE, JR., in his capacity as Liquor Control Administrator; and ATTIC LOUNGE, INC.

1980

Sept. 23 Petition for Writ of Certiorari filed in Rhode Island Supreme Court by Tiverton Board of License Commissioners requesting review of Superior Court decision.

1980

Octo. 31 Rhode Island Supreme Court grants Certiorari Petition for review of Superior Court decision.

Nov. 18 Certiorari Writ issues from Rhode Island Supreme Court for transmittal of file from Providence County Superior Court to Rhode Island Supreme Court.

1983

April 7 Oral argument on Petition by both parties.

July 18 Decision of Rhode Island Supreme Court filed denying Tiverton Board of License Commissioners' Petition for Certiorari and affirming Providence County Superior Court decision that exclusionary rule barred revocation of Attic Lounge's liquor license on the basis of evidence obtained by illegal warrant.

IN THE SUPREME COURT OF THE
UNITED STATES

No. 83-963

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON

vs.

LOUIS H. PASTORE, JR., in his capacity as Liquor Control Administrator of the State of Rhode Island and ATTIC LOUNGE, INC.

1983

Dec. 13 Petition for Writ of Certiorari filed by Tiverton Board of License Commissioners with the United States Supreme Court seeking review of decision of Rhode Island Supreme Court.

1984

July 5 United States Supreme Court grants Petitioners' request for Certiorari review of decision of Rhode Island Supreme Court.

OPINIONS BELOW

A. Decision of Board of License Commissioners of the Town of Tiverton, March 28, 1977.

Council Meeting of March 28, 1977

The Tiverton Town Council was sitting as the Board of Licensing Commissioners:

Atty. Abatuno of Providence represented the owners of the Attic Lounge, Inc.

Mr. Abatuno urged Council to look at Title III Chapter 5-23 which is Council's authority to consider the re-

vocation of a liquor license. Line two of this Chapter requires a conviction to revoke this license and Mr. Abatuno contended there was no conviction.

Town Solicitor Arthur Murphy advised that a conviction was not necessary for the revocation of a liquor license.

Mr. Abatuno requested he be allowed to call witnesses in this matter.

Police Chief Washburn was sworn in as an adverse witness and questioned by Mr. Abatuno.

Chief Washburn stated he had received a tip from the Fall River Police Department that there were stolen goods on the property of the Attic Lounge, Inc., 469 Main Road, Tiverton, R.I., obtained a search warrant, entered premises and discovered stolen property. Officer Paul Carey of Fall River Police Department was sworn in and testified that he had contacted the Tiverton Police Department of this matter.

Mr. Abatuno stated that Mr. Roger Benoit and Mr. Alfred Morrell were the two men charged with this felony by the Police Department, they are the bartender and manager, respectively.

Town Solicitor Murphy submitted photos of the establishment showing the goods in question and statement of Complaining Witness taken by Det. Peter Dias of the Tiverton Police Department and asked that they be entered as Exhibits A, B, C, and D.

Atty. Abatuno stated that Mario Ferreira and Mr. John Souza were present this evening, that they are the two stockholders in the corporation, which is so stated on

the license application, they knew nothing about this and asked that they be sworn in to testify.

Mr. Ferreira was sworn in by Council President Dias.

Mr. Abatuno asked Mr. Ferreira where he was on the night that Police entered the Attic Lounge and discovered the stolen goods.

Mr. Ferreira stated he was working at his gas station in East Providence and knew nothing of this, and had not been on the premises for at least one month prior to this date March 11, 1977.

Town Solicitor Murphy asked what percentage the stock Mr. Ferreira owned.

Mr. Ferreira answered 100%.

Mr. Murphy asked if any of the shares of the corporation were pledged to Mr. Joseph Callahan.

Mr. Abatuno answered he believed they were—he believed they were pledged to a loan.

Mr. Murphy asked if Mr. Callahan physically handled all of the stock certificates of the corporation.

Mr. Ferreira answered that Mr. Callahan handled the operation of the business

It was established that Mr. Mario Ferreira, Mr. John Souza and Mr. Michael Silvia together held 100% of the shares of the corporation.

Mr. John Souza was then called upon to testify. He was sworn in by the Council President, Dias.

Mr. Souza advised that he had no knowledge of the goods being at the Attic Lounge.

Town Solicitor Murphy asked Mr. Souza if he owned 1/3 of the stock if his shares were also pledged to Mr. Joseph Callahan and when was the last time he (Mr. Souza) was in the establishment.

Mr. Souza replied that he did own 1/3 of the stock which was also pledged to Mr. Joseph Callahan and that he had not been on the premises of the Attic Lounge for over a year.

Mr. Murphy asked Mr. Souza if he made any decisions with reference to the Attic Lounge.

Mr. Souza replied that his attorney made the decisions. Mr. Joseph Callahan was his attorney.

Motion by Carreiro, seconded by Barboza to revoke the Liquor License of the Attic Lounge, Inc. of 469 Main Rd. Tiverton, R.I.

For the motion: Carreiro, Dias, Barboza, Brilhante.

Against: Souza, Durfee, Tidwell.

Motion passed on a 4 to 3 vote.

A true copy Attest:

/s/ Alice R. Hawkins
Deputy Town Clerk

OPINIONS BELOW

B. Decision of Louis H. Pastore, Jr., Liquor Control Administrator, August 3, 1978.

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

DEPARTMENT OF BUSINESS REGULATION
LIQUOR CONTROL ADMINISTRATION

ATTIC LOUNGE, INC., d/b/a CABARET
469 MAIN ROAD, TIVERTON

vs.

BOARD OF LICENSE COMMISSIONERS
TOWN OF TIVERTON

DECISION

Appellant, Attic Lounge, Inc., received notice in the form of certified mail, dated March 21, 1977, from Arthur W. Murphy, Esquire, Town Solicitor, that the Licensing Board of the Town of Tiverton was to hold a public hearing on Monday, March 28, 1977, at which hearing Attic Lounge, Inc. was to show cause why its Class BV license should not be suspended or revoked for violation of Rhode Island General Laws 1956, as amended, Section 3-5-23 in that the licensee permitted the laws of the State of Rhode Island to be violated on the licensed premises. Said notice further indicated that the license holder knew by the exercise of reasonable care that the licensed premises contained stolen goods in violation of the General Laws of the State of Rhode Island.

The notice further indicated that at the hearing, the licensee could be represented by an attorney and that failure to attend would be cause for revocation of his license.

The hearing to show cause was duly held on March 28, 1977. At said hearing, counsel for the licensee requested that the Board of License Commissioners carefully consider the revocation of the license in question for Rhode Island General Laws Section 3-5-23, required a conviction to revoke the license and at that point in time there was no conviction.

The hearing continued and information and evidence was presented that the Tiverton police had entered the licensed premises under a search warrant and discovered stolen property thereon. At the conclusion of the testimony and evidence at said hearing, the Board of License Commissioners by a four to three vote determined and in fact did revoke the liquor license for Attic Lounge, Inc. for its Class BV license for the premises situated at 469 Main Road, Tiverton, Rhode Island.

Thereupon, appeal was duly taken to this office and a hearing *de novo* was held on said appeal on July 6, 1978 at which time both parties were represented by counsel and provided with the opportunity to present witnesses to examine and cross-examine said witnesses.

On the hearing before this Board, evidence was introduced that neither the license holder, Attic Lounge, Inc., nor the principals involved in that corporation had been convicted as a result of the alleged stolen goods having been found on the licensed premises. This fact was uncontroverted. The Town of Tiverton on the other hand took the position that a conviction was not necessary for a revocation of a liquor license. Attorney for the licensee argued to this Administrator as he had previously done before the License Commissioners of the Town of Tiverton, that the Rhode Island General Laws

referred to at the time of hearing before the License Commissioners did in fact require a conviction.

Section 3-5-23 is entitled "Revocation of license for criminal offenses or disorderly conditions . . . " The pertinent part of that General Law reads as follows:

> "If any licensed person shall be convicted of violation of any of the provisions of this title or of chapter 6, chapter 10, chapter 34, chapter 40 or chapter 45 of title 11, or of § 11-2-1, § 11-3-4, § 11-9-13, § 11-9-15, § 11-11-5, § 11-11-6, §11-18-2, to 11-18-4, inclusive, § 11-20-1, § 11-20-2, § 11-23-4, §11-27-20, §§ 11-30-1 to 11-30-11, inclusive, § 11-31-1 or §§ 11-37-2 to 11-37-4, inclusive, or shall plead guilty or nolo contendere to any complaint or indictment thereunder . . . his bond shall be put in suit by the town. . . ."

The statute further goes on to indicate that:

> "If any licensed person shall . . . permit any of the laws of this state to be violated therein . . . and if it shall be made to appear to the satisfaction of the board . . . that he has violated any provisions of this title (Title 3) or has permitted to be done any of the things hereinbefore in this section mentioned, then said board, . . . may suspend or revoke his license . . ."

The record is clear and uncontroverted that there was in fact no conviction as required by Section 3-5-23.

It is this Board's determination, based upon all the evidence before it, that the action of the Board of License Commissioners was premature inasmuch as there was no conviction as required by the statute at the time of the hearing.

Consequently, the decision of the Board of Licensing Commissioners in revoking the license in the instant mat-

ter is overturned and said Board of License Commissioners is hereby directed to reinstate said license forthwith.

/s/ Louis H. Pastore, Jr.
Liquor Control Administrator

DATED: August 3, 1978

OPINIONS BELOW

C. Decision of Providence County Superior Court, August 6, 1980.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

C.A. NO. 78-2659

BOARD OF LICENSE COMMISSIONERS OF THE TOWN OF TIVERTON

v.

LOUIS H. PASTORE, JR., in his capacity as Liquor Control Administrator and ATTIC LOUNGE, INC.

D E C I S I O N

GRANDE, J. The matter before the Court is an appeal from a decision of the Liquor Control Administrator. The Administrator overturned a decision of the Board of License Commissioners of the Town of Tiverton revoking the Class BV liquor license of the Attic Lounge, Inc., d/b/a Cabaret, located at 469 Main Road in Tiverton. The issues are 1) whether a liquor license may be revoked on the basis that the holder, even though he has not been con-

victed of a crime, permitted a violation of law to occur on the premises, and 2) whether the exclusionary rule applies to hearings before the Liquor Control Administrator.

On March 11, 1977 a Tiverton police sergeant, pursuant to a search warrant, entered and searched Attic Lounge and discovered stolen property on the premises. On March 28, 1977 the Board held a hearing at which Attic Lounge failed to show cause why its liquor license should not be suspended for permitting state law to be violated on the premises in violation of *Rhode Island General Laws* § 3-5-23, *infra*. Testimony was taken concerning the discovery of stolen goods on the premises, and the Board voted to revoke the establishment's liquor license. Attic Lounge appealed the Board's decision to the state Liquor Control Administrator. In the meantime this Court, in a decision written by Mr. Justice Carrellas and filed in Newport on January 16, 1978, ruled in a criminal proceeding stemming from the same incident that the March 11, 1977 search of Attic Lounge had been an illegal search.

The Liquor Control Administrator, pursuant to Attic Lounge's appeal of the Board's decision to revoke, held a *de novo* hearing on July 6, 1978. The Administrator heard uncontradicted testimony that neither Attic Lounge nor any individual involved with that establishment had been convicted of any crime as a result of the goods found on the licensed premises. The Administrator ruled on August 3, 1978 that the license of Attic Lounge could not be revoked on the basis of the presence of stolen goods because there had been no criminal conviction for receiving stolen goods.

The Board, in its appeal to this Court, argues that the Administrator erred in holding as a matter of law that a criminal conviction is a necessary prerequisite for revocation in these circumstances. See *R.I.G.L.* § 11-41-2. The Board also contends that in attempting to show that the licenses permitted a state law to be violated on the premises, the Board may use evidence obtained as a result of the search which this Court previously found to be illegal.

The Board's argument that a prior conviction is not a prerequisite for revocation is correct. The statute in question, *R.I. G.L.* § 3-5-23, reads in relevant part

> . . . *If any licensed person* shall permit the house or place where he is licensed to sell beverages under the provisions of this title to become disorderly so as to annoy and disturb the persons inhabiting or residing in the neighborhood thereof, or shall permit any gambling or unlawful gaming to be carried on therein, or *shall permit any of the laws of this state to be violated therein, in addition to any punishment, penalty or penalties which may be prescribed by statute for such offense, he may be summoned before the board, body or official which issued his license or before the liquor control administrator* when he and the witnesses for and against him may be heard; *and if it shall be made to appear to the satisfaction of the board, body or official hearing such charges that he has violated any of the provisions of this title or has permitted to be done any of the things hereinbefore in this section mentioned, then said board, body or official may suspend or revoke his license* or enter other order thereon. . . . (Emphasis added.)

There are at least three reasons why this statute should not be construed as requiring a prior conviction for revocation in circumstances such as those in the case at bar. First and foremost, the statute does not expressly state

that a conviction is necessary, and the statutory language does not appear to imply that one is necessary. If the licensed person "shall permit . . . the place . . . to become disorderly so as to annoy and disturb the persons inhabiting or residing in the neighborhood," the license clearly may be revoked without any criminal conviction. This does not appear to be disputed. The Court does not see why the words "shall permit any of the laws of this state to be violated therein" should warrant a different construction. If the licensee "shall permit any of the laws of this state to be violated therein" and if such a violation is shown "to the satisfaction of the board" or administrator, then the board or administrator may revoke the license. Second, our state Supreme Court has stated that a liquor license revocation proceeding and a criminal action based on the same incident are entirely separate proceedings which are in no way dependent upon one another. In *Chernov Enterprises, Inc. v. Sarkas*, 109 R.I. 283, 284 A.2d 61 (1971), the court stated

> [Petitioner] completely ignores the established principal that a proceeding under the laws regulating the sale of alcoholic beverages is entirely separate and distinct from a criminal prosecution for the same offense, and that the two proceedings, rather than being interdependent or mutually exclusive, are co-existant. While one is in the nature of an action in rem, the other is against a licensee personally. Both may be instituted and pursued simultaneously or otherwise. *Id.* at 288, 64. See also *DiTraglia v. Daneker*, 83 R.I. 227, 115 A.2d 345 (1955).

Third, the power of the legislature to regulate strictly and pervasively the sale of alcoholic beverages by delegating the control of liquor traffic to administrators and local boards has long been recognized. Our state Supreme Court

emphasized this point to *Vitterito v. Sportsman's Lodge*, 102 R.I. 72, 228 A.2d 119 (1967):

> It is well settled that the business of the sale of intoxicating liquor is so completely subject to the exercise of the police power of the state that it may even be entirely prohibited by the State, or it may be authorized subject to such restrictions and burdens, however great, as the legislature may deem it advisable to impose. The only limitations on legislative prerogatives in this area are the equal protection and due process clauses of the federal constitution. *C. Tisdall Co. v. Board of Alderman*, 57 R.I. 96; *Mugler v. Kansas*, 123 U.S. 623.
>
> So also is it settled that the vesting of the licensing power and subsequent regulation and supervision of such licenses in the several municipal governments in the first instance is a constitutonal delegation by the legislative policy determination that the conferring of administrative and regulatory authority upon a governmental agency can best achieve efficient control of the liquor traffic . . . *Id.* at 75-76, 122.

To hold that a board or administrator may not revoke a liquor license without a prior criminal conviction would be tantamount to delegating license revocation authority to the prosecuting arm of government because the prosecutor has discretion in determining which criminal acts will be prosecuted. This would be contrary to the well established principle just alluded to in *Vitterito*.

Having determined that a conviction for receiving stolen goods is not a prerequisite for revocation, the Court must now decide whether evidence obtained as a result of an illegal police search is admissible at a hearing before the Administrator. The Board argues that such evidence is admissibie because 1) the statutory exclusionary rule,

R.I. G.L. §9-19-25, applies only to "trials" and "actions in any court", and not to administrative proceedings, and 2) the "potential benefit from allowing evidence where stolen goods were seized outweighs the harm to the individual involved" and therefore the admissibility of the evidence is constitutionally permissible.

The Board's assertion that § 9-19-25 does not apply to a hearing before the Administrator is correct. The statute reads

> Illegally seized evidence inadmissible.—In the trial of any action in any court of this state, no evidence shall be admissible where the same shall have been procured by, through or in consequence of any illegal search and seizure as prohibited in section 6 of Article 1 of the constitution of the state of Rhode Island.

The hearing is not a "trial of any action in any court." Furthermore, our state Supreme Court has declared that § 9-19-25 should be strictly construed. That court decided in *State v. Spratt,* R.I. , 386 A.2d 1094 (1978), that the statute does not apply to probation revocation hearings, and in deciding this issue said:

> . . . the further question remains whether use of illegally procured evidence at a revocation hearing is barred by G.L. 1956 (1969 Reenactment) § 9-19-25, our statutory exclusionary rule.
>
> That enactment yields no plain answer to that question, and nothing contained therein or in any related enactment even hints at whether the Legislature, in enacting an exclusionary rule that is applicable "[i] the trial of any action in any court of this state." (emphasis added) intended to include revocation hearings. Neither is there any legislative history or other record of the considerations leading to its adoption which might aid in the interpretative function.

> Thus, while the Legislature may have been motivated by diverse purposes when it enacted § 9-19-25, the only clue to those intentions is the knowledge that the statute is undoubtedly a response to our decision in *State v. Olynik,* 83 R.I. 31, 113 A.2d 123 (1955). In the circumstances, the legislative purpose can be reasonably construed as intending to supply a rule of evidence that would make inadmissible that which this Court has held admissible in *Olynik,* see *State v. Davis,* 105 R.I. 247, 252 251 A.2d 394, 397 (1969); *State v. Dufour,* 99 R.I. 120, 136-37, 206 A.2d 82, 91 (1965) (Joslin, J., concurring), thereby negating our refusal to apply the exclusionary rule at a formal criminal trial at which guilt or innocence was to be adjudicated. In our judgment the legislative intention was limited to the accomplishment of that purpose, and we refuse to impute an intention to expand the rule beyond that point. If our reading of the legislative purpose is inaccurate, the enactment of § 9-19-25 in response to *Olynik* makes clear that the Legislature knows how to set the matter straight. *Id.* at 1096 (footnote omitted).

The only remaining issue, therefore, is whether admission of the evidence is constitutionally impermissible as a violation of the fourth amendment's prohibition against unreasonable searches and seizures.[1] See *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

Although it is a difficult task "to demarcate the seemingly inexhaustible reach of the exclusionary rule", *People v. McGrath,* 412 N.Y.S. 2d 801, 804, 385 N.E. 2d 541, 543 (1978), the Board's argument that exclusion of the evi-

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1. In *State v. Davis,* 105 R.I. 247, 251 A.2d 394 (1969), the court stated that ". . . art. I, sec. 6, of our [state] Constitution has been construed as having the same effect as the fourth amendment to the Constitution of the United States." *Id.* at 252, 397.

dence is not constitutionally required appears to be incorrect. Where a judicial determination that a search was illegal has been made, a liquor administrator should accept the courts' ruling and exclude the evidence, and should not attempt to make its own determination of the legality of the search. *Commonwealth Liquor Control Board v. Mottola's 51 Tavern, Inc.*, 37 Pa. Cmwlth. 234, 389 A.2d 1213 (1978); *Pennsylvania Liquor Control Board v. Leonardziak*, 210 Pa. Super. 511, 233 A.2d 606 (1967); *Finn's Liquor Shop v. State Liquor Authority*, 301 N.Y.S. 2d 584, 249 N.E. 2d 440 (1969), *cert. den.* 396 U.S. 840, 24 L.Ed. 2d 91, 90 S.Ct.. 103 (1969); *Leogrande v. State Liquor Authority*, 268 N.Y.S. 2d 433 (1966). All of the above cited cases involved a fact pattern essentially identical to that in the case at bar. See also *Sponick v. City of Detroit Police Department*, 49 Mich. App. 162, 211 N.W. 2d 674 (1973) (illegally obtained evidence inadmissible at police trial board hearing); *McPherson v. New York City Housing Authority*, 365 N.Y.S. 2d 862 (1975) illegally obtained evidence inadmissible at dismissal hearing of housing authority patrolman; *People v. McGrath, supra*, at 804, 544 ("the applicability of the exclusionary rule to administrative as well as criminal proceedings in New York can no longer be disputed"). Moreover, the fact that a state liquor administrator had no association with the hearing on the motion to suppress, is not determinative. As the Court of Appeals of New York stated in *Finn's Liquor Shop, supra*, at 594, 447:

> . . . the Authority was not permitted to disregard a court determination (in the criminal case) that the evidence was, in fact, the fruit of an illegal search and seizure. The Authority has given no adequate reason why it should be allowed to re-examine the issue of the legality of a search after a court has already decided the question. It merely asserts that it has no association with the District Attorney's Office and thus should not be concluded by a decision in a case in which it was not a party. Although the two agencies may be treated, for other purposes, as independent parties, this can hardly be the case where they are both seeking to use the same police officials as their agents to gather evidence. If the search and seizure was unconstitutional to the extent that it was performed for the benefit of the prosecutor, the same act could hardly be considered lawful for the Authority's purposes. *Since the facts and the issues are the same, the court's decision on the motion to suppress that the search and seizure was illegal should be determinative of the issue.* Such a decision is, of course, reviewable through the normal appellate process but neither the administrative hearing nor an action under article 78 to review it constitutes an appropriate proceeding to pass upon the propriety of a judicial decision which has never been directly challenged. (Emphasis added.)

The Board, urging that the exclusionary rule does not apply, cites *Spratt, supra*, and *Bridges v. Superior Court*, R.I. , 396 A.2d 97 (1978), a bail revocation case. In these cases the court said the test would be to

> . . . consider whether any increased deterrence of future police misconduct would result from extending the rule and then balance that incremental increase against the risks to society that extension is likely to produce. *Spratt, supra*, at 1095.

But *Mapp* has already emphasized that deterrence of police misconduct and the policy that the government should not benefit from its own wrongdoing are to be accorded great weight in this balancing process. This Court does not fell that a reexamination of the exclusionary rule

is mandated simply because the license revocation process is not labeled criminal. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 14 L.Ed. 2d 170, 85 S.Ct. 1246 (1965) and *Finn's Liquor Shop, supra.* The Board has cited no case where, on facts like those in the case at bar, any court has struck this balance in favor of admissibility of the evidence. The precedent in this area, cited *supra*, holds that exclusion is required.

Because it is clear from the record that the Board, without the inadmissible evidence, does not have sufficient evidence to substantiate its allegation, the decision of the Administrator is affirmed insofar as it directs reinstatement of the license of Attic Lounge.

Counsel shall prepare and submit to the Court an order in conformity with this decision.

OPINIONS BELOW

D. Decision of the Rhode Island Supreme Court is contained in the Petition for Certiorari at pages A-1 through A-10.

STENOGRAPHIC TRANSCRIPT OF HEARING BEFORE RHODE ISLAND LIQUOR CONTROL ADMINISTRATOR, LOUIS H. PASTORE, JR.,

July 6, 1978.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF BUSINESS REGULATION
100 NORTH MAIN STREET
PROVIDENCE, RHODE ISLAND

HEARING IN RE:

ATTIC LOUNGE, INC.
d/b/a CABARET
469 MAIN ROAD
TIVERTON, RHODE ISLAND

HELD ON:
July 6, 1978

BEFORE:

LOUIS H. PASTORE, JR.
LIQUOR CONTROL ADMINISTRATOR

APPEARANCES

ARTHUR W. MURPHY, ESQUIRE _____
_____ TOWN SOLICITOR

MICHAEL A. ABATUNO, ESQUIRE _____
_____ FOR THE APPELLANT

ANGELO MORROCCO, ESQUIRE _____
_____ FOR THE APPELLANT

(p. 1) MR. PASTORE: The meeting is declared opened. This is an open hearing. Everything will be on the record. To start things off, I'm Louis Pastore, Liquor Control Administrator. To my right is Ruth Jackson, our technician. To my left is John Hines, attorney with the Department of Business Regulation.

Would the Town identify itself, please?

MR. MURPHY: I'm Arthur W. Murphy, Town Solicitor for the Town of Tiverton.

MR. PASTORE: Thank you, Mr. Murphy.

MR. ABATUNO: Michael A. Abatuno, I represent the license holder and to my right is Angelo Morrocco; an associate of mine in my office.

MR. PASTORE: Thank you, Mr. Abatuno. My understanding is that we are here on an appeal from a decision made locally that in essence revoked a Class BV license. Mr. Abatuno on behalf of the Appellant brought the appeal to the Administrator. To the best of my knowledge it is here properly. Essentially, perhaps the Town could enlighten us and tell us why this license was revoked, if you would, Arthur, please.

MR. ABATUNO: I would object to the statement by an attorney. I feel that we ought to proceed with the rules and others and have — if you want to make an opening and tell what he intends to prove, I would have no objection.

(p. 2) MR. PASTORE: Fine. Now, my suggestion Mr. Abatuno is let the Administrator run the hearing. Please proceed, Mr. Murphy.

MR. MURPHY: Mr. Administrator, it's the Town's position that the license in question, the licensee in question had a violation of the law occur on its premises, that the licensee was given notice to have a hearing before the Town Council of the Town of Tiverton. The licensee did in fact appear at the hearing represented by Mr. Abatano, that a hearing was —

MR. ABATUNO: May — may I please correct him. My name is Abatuno. It's bad enough, but don't fracture it.

MR. MURPHY: Abatuno, my apologies.

MR. ABATUNO: Thank you.

MR. MURPHY: — that the full hearing was had and that the Board of License Commissioners of the Town

of Tiverton acted properly in revoking the license. And further, we have some procedural defects concerning the appeal which we would — number one of which is that because of the licensee to reapply for the '78 licensing year that he has really waived his appeal and he's out of time, but basically —

MR. PASTORE: Okay. At the proper time. What we're trying to get right now, Mr. Murphy, we're rather informal here. Please be seated and be comfortable. Basically, what I'm trying to get at is that Tiverton made a decision to revoke a license. You claimed that there was a violation of a law. In essence, what are you talking (p. 3) about? What violation of the law?

MR. MURPHY: We stated there was a violation of law and that there were possession of stolen goods on the premises.

MR. PASTORE: I see. And this is the basis of why the license was revoked.

MR. MURPHY: This is the basis.

MR. PASTORE: Do you have any witnesses you want to put forward, Mr. Murphy?

MR. MURPHY: I have the Town Clerk to verify some records and I have a police officer from the Town of Tiverton who accompanied—who was present at the time when the alleged violation occurred.

MR. PASTORE: Okay. Why don't we proceed. Put your first witness on, if you would please.

MR. MURPHY: I would ask the commissioner, the Administrator that the—do you have the record before you that was forwarded from the Town Clerk.

MR. PASTORE: Yes. The record was forwarded to this office upon request. I can share that with both you and counsel, if that's what you're after.

MR. MURPHY: Do you have the pictures, too?

MR. PASTORE: Yes. We have some. It's exactly what we have. The record that was forwarded, and here are the pictures. Would you like an opportunity to examine that and share it with counsel? Okay, let's go off the record for a moment. Let counsel share that information.

(p. 4) (Off the Record)

MR. PASTORE: Okay. We're back on the record. Now, you have, to the best of my knowledge, what was forwarded to us, Mr. Murphy, and that was the record of the council meeting, I imagine it was what—March 28th 1977. You also have a few photographs.

MR. ABATUNO: The record of the council meeting is not an accurate record. I would object for that reason. It's merely a recap or summary in someone else's words, not a verbatim statement. I made an argument that must have lasted at least one hour before the outset of this hearing, when they were saying, "Mr. Abatuno, proceed." It's not up to me to proceed. The burden of proof is on the council.

MR. PASTORE: Okay. The bottom line, as I understand it, counselor, if you object to this record—

MR. ABATUNO: I object to that record because it's not an accurate record, first of all. And secondly, this is a hearing *de novo*.

MR. PASTORE: Absolutely correct.

MR. ABATUNO: And I also object to the statement —the alleged statement of the photocopy of the statement of the witness, not the original but a photocopy of the statement and I don't know who the witness is. I can't read the entire statement. It's hearsay. If they have a witness who wants to testify, let them produce him. Let him testify here today. Then he'll be sworn under oath, there will be a guarantee of trustworthiness and thirdly, (p. 5) I will have an opportunity to cross-examine him.

As far as the pictures go, the pictures fall under a different category. I don't know what these pictures are. They show men's jackets. They could have been taken anywhere. I don't know who the photographer is. Secondly, if they were taken in the establishment and that has not been ascertained, then and if they were in the establishment without a proper search warrant, this is referred to in the law as "fruit from the poison tree". And the matter—if the tree is poisoned and also the fruit are also poison. And everything that follows from an illegal search is also illegal and obtained without due process of law. I see these words on the board and they're all applicable to this hearing.

MR. PASTORE: Thank you counselor. Mr. Murphy, counsel for the Appellant is talking about poison fruit here. Could you enlighten me? Where did all this come from and what's it about and what do you intend to do with it?

MR. MURPHY: First of all, Mr. Commissioner, the law, I think, is quite clear in Rhode Island and in that I refer to Title 3-5-26 and it reads as follows: "The boards

or officials issuing licenses, i.e. the Town of Tiverton hereunder shall keep records of their proceedings with respect thereto and the same are hereby declared to be public records" and it goes on, "copies of such records duly certified by the secretary or the clerk of the board, (p. 6) body or official keeping," and these are certified by the Clerk of the Court, "shall be received in any court as evidence of any of the proceedings contained therein." My brother has brought out a very good point. That's his side of the case. If he wants to argue through the poison tree doctrine, and that doctrine obviously, quite simply is that if there was an illegal search, everything that follows after that illegal search is wiped out.

I don't think that's the status of things—that's the status of things in the criminal side of the ledger. On the civil side of the ledger, that is not—it's the Town's position that it's not the law. However, as we get to first things first, the part of the record quoted to this board is duly certified by the Clerk. The Clerk is here if I need him put on the stand. And while my brother might say that it's inaccurate or inadmissible or, excuse me, not inadmissible, but not relevant to this particular hearing, it is under the law should be permitted here. So I just want to get this record into evidence.

MR. PASTORE: Basically, Mr. Murphy, and I think both of you, or certainly you have been before this board before, basically, we all understand this is *de novo*. However, it's been a long standing custom of ours to accept the record for what it's worth. Now, the record I'm referring to would be the record of the proceedings, March 28, which I'd say roughly, Michael, is a resume of what

happened. It's by no means complete and I recognize that.

(p. 7) MR. ABATUNO: I would have to agree with that.

MR. PASTORE: Okay. So for what it's worth, that document we usually accept. Now, when it goes to the pictures and it goes to, let's say statements of witnesses, at that particular point, John, my understanding is we get a little cautious because counsel does not have the opportunity to cross-examine. And I don't know what you're thinking there, Mr. Murphy. Do you understand the point of the Commissioner?

MR. MURPHY: My understanding is everything that is submitted before the board at the hearing is the evidence that was submitted at the hearing and that is the record.

MR. HINES: Well, Mr. Abatuno said he was at the hearing, but didn't see those pictures. That's the difficulty we have. That if indeed they were part of the record of the hearing, it would fall within the first category Mr. Pastore spoke of, but Mr. Abatuno has said he didn't see those up there.

MR. PASTORE: Do we understand you correctly, Mr. Abatuno?

MR. ABATUNO: Let me correct myself. I have seen those pictures before.

MR. HINES: At the hearing?

MR. ABATUNO: At the hearing. But I agree with what the Commissioner says. This is what the law says

as Mr. Murphy repeated it. "They shall keep (p. 8) records of their proceedings with respect thereto." It doesn't say the evidence. The evidence down there is not evidence up here. What Mr. Murphy tried to do here, is not only introduce the record of the proceedings but also evidence that was produced by him down there and they're two different things here.

I agree with what the Commissioner says. For whatever value it has—

MR. PASTORE: For what it's worth.

MR. ABATUNO: —for what it's worth, the record of the proceedings should be admitted and if we want to dispute a portion of that, we may. But insofar as pictures and statements go, I object strenuously. And insofar as the license goes, the statement of good standing, I would have no objection to the license to show who the license holder is and also to show the fact that the six hundred dollar fee was in fact paid and that the taxes were in fact paid.

MR. PASTORE: What's really an issue here, my understanding, Michael, is the pictures. Is that what's really at issue here?

MR. ABATUNO: The pictures and the statement.

MR. PASTORE: And the statement. Let's go off the record for a moment. Gentlemen, just give me a moment on this.

(Off the Record)

(p. 9) MR. PASTORE: I'll give you a ruling on this portion of it because we would like to get to the meat and

potatoes. Right now we seem to be dealing with the frosting.

Again, our custom has been that we will accept the record for what it's worth. Earlier statements by the Commissioner, by the attorney were more or less aimed at the fact or what we thought was a fact that counsel for the Appellant was not aware or that the pictures or statements were not part of an earlier record. But that becomes clear that it is part of the earlier record. So, for what it's worth, we will accept the record in its entirety. We will note the objection of Mr. Abatuno and any comment that he wants to make regarding any part of this record will be part of the record of this proceeding. So you may go on, counselor, if you will, but this is accepted for what it's worth. Please bring it forward and we'll mark these.

MR. ABATUNO: I would take an exception.

MR. PASTORE: Exception noted.

MR. ABATUNO: I'm going to reserve my right also to cross-examine the party who made such a statement that has been offered. I reserve my right to cross-examine the Clerk who allegedly made that record who is present, I understand. And I also take exception to the admissibility of any portion of the record because although the record is a public record, it does not necessarily mean that it should play any role whatsoever (p. 10) in this hearing *de novo*.

MR. PASTORE: Counselor, do you understand what I say, when I say "for what it's worth".

MR. ABATUNO: Yes, I do.

MR. PASTORE: Okay. Exception is noted and all your rights are reserved, counselor.

MR. ABATUNO: Thank you.

MR. PASTORE: Let us mark these for the record now. First the proceedings of Council Meeting of March 28, 1977, let's mark that Exhibit 1, John. Okay, we have three photographs here. With the photographs, we'll mark them two, three and four, Exhibit 2, 3 and 4. Number 5 will be the applications for license by corporation. Along with that we'll make number five—is that four, John?

MR. HINES: That's five.

MR. PASTORE: Five, we'll make number six Mr. Norberg's Certificate of Good Standing. We have correspondence from Mr. Callahan regarding the Department of Taxation and Good Standing, let's mark that seven. Correspondence from Mr. Callahan, "enclose check amount of $600.00 for the license renewal fee." That's dated December 3rd, 1976, make that eight, John. What would this be, statement of complaining witness, that would come down as—

MR. HINES: Nine.

MR. PASTORE: Number nine.
Okay, Mr. Murphy, where do we go from here?

(p. 11) MR. MURPHY: I'll call my first witness, Sergeant Davol.

MR. PASTORE: Sergeant Davol? Would you spell the last name, please?

MR. MURPHY: D-A-V-O-L.

MR. PASTORE: Your full name and address, please.

SERGEANT DAVOL: Asa, A-S-A W. Davol, D-A-V-O-L, 3879 Main Road in Tiverton. I'm a police officer for the Town of Tiverton.

(Asa W. Davol, sworn)

Examination by Mr. Murphy

Q. Sergeant, how long have you been a member of the Tiverton Police Department?

A. Fourteen years.

Q. And directing your attention to March 11th, 1977, were you a member on that day?

A. Yes, I was.

Q. And were you on duty that day?

A. I was.

Q. And are you familiar, Sergeant, with the location of the Attic Lounge, sometimes known as the Cabaret in the Town of Tiverton?

A. Yes.

Q. And where is its location?

A. It's located on Main Road, approximately two miles from me, down the street.

Q. Now, directing your attention to the day of March 11th, did you have occasion to go to the Attic Lounge?

(p. 12) MR. ABATUNO: I object to that.

MR. PASTORE: What's the purpose of the objection, Mr. Abatuno?

MR. ABATUNO: Is he's (sic) going to—whether he went there or not is unimportant. It's irrelevant and immaterial. Many people—he may have gone to the bathroom that day, he may have been home, he may have gone to church and he may have been anywhere, but whether or not he went there is not important.

MR. HINES: This could be foundation questions or something more significant.

MR. PASTORE: That's what I understand. Let's get him there and see what happens.

Q. Did you go there in your official capacity as a member of Tiverton Police Department?

A. Yes, I did.

Q. And whether of your knowledge was a warrant —to a search warrant for the premises in the possession of the Tiverton Police Department at that time?

MR. ABATUNO: Objection.

MR. PASTORE: Okay. Mr. Abatuno is objecting again. What's the purpose of the objection this time, Mr. Abatuno?

MR. ABATUNO: I'll let him answer that question. I'm not objection— (sic)

MR. PASTORE: Okay. Please answer the question, Sarg.

(p. 13) A. When I went to the premises of the Cabaret which is known as the Attic, there was a search warrant in effect when I went into the building.

MR. PASTORE: Okay.

MR. ABATUNO: Now I'll move to strike it.

MR. PASTORE: Why do you want that stricken?

MR. ABATUNO: I'll strike it because of the fact he didn't say he had it with him. He went to the building. He said there was one in effect, but that does not give him the right to enter the building.

MR. HINES: Your objection goes to the weight of the question. I don't think it goes to the admissibility of it.

MR. ABATUNO: Well then, I refer Mr. Hines to Judge Carrelos' decision which was filed in Newport Superior Court on January 16, 1978.

MR. MURPHY: I think we—may I, Michael I would stipulate that Judge Carrelos' decision knocks out both of the arrests made that day on the basis or partially on the basis that the warrant was illegaliy obtained.

It's the position of the Town, however, and I think the law of this state and I cite specifically The Schernoff versus Sarkas, 109 RI 283 which holds that criminal prosecutions for an offense in liquor license revocations proceedings for the same offense are to be (p. 14) considered as separate and distinct proceedings. I have no—no problem with my brother's proposition that all criminal actions as a result of this illegal search which Carrelos found as an illegal search. Anything that is found out of there is the fruit of the poison tree doctrine applies and—

MR. PASTORE: Arthur, was this part of the search. The illegal search you're talking about, is this what the sergeant is relating—

MR. MURPHY: This is what the sergeant is relating to.

MR. PASTORE: I see. And essentially what Michael is bringing to our attention is that, as you grasp immediately, that it was done illegally and, therefore, everything that follows and so forth and so on.

MR. MURPHY: Yes. I think—and we could be here until four o'clock.

MR. PASTORE: Right. Right.

MR. MURPHY: I'll stipulate that it was—

MR. PASTORE: Okay. Counselor?

MR. ABATUNO: May I be heard on this?

MR. PASTORE: Certainly.

MR. ABATUNO: Rather than argue law, I'm going to have Mr. Morraco argue law because of my speech impediment.

MR. PASTORE: Certainly. Certainly.

(p. 15) MR. MORRACO: The case which my brother refers to Chernov versus Sarkas also stands for the proposition that a cause for suspension must be established by legally competent evidence. My brother has formally said that that case stands for the proposition that a criminal action is separate and apart from the administrative action. I submit that that case also stands for the proposition that legally competent evidence must be used in an administrative proceeding. There's a wealth of authority in this State and in other states that suggest that the exclusionary rule which is the operative tool of the fourth amendment applies not only to criminal action but also applies to administrative actions. If the fourth amendment exclusionary rule didn't apply to administrative actions,

then these particular administrative bodies would be in a position to usurp the power of the Constitution to regulate the activities of police departments. I submit to you that it would be unjust, totally unfair and aggregation of due process for this body not to take cognizance of the fact that the exclusionary rule of the fourth amendment applies equally to this particular type of hearing as it does in the Superior Court. There are three New York cases that stand exactly for that proposition. One case is LaPenta versus the New York State Liquor Authority. That case is cited 294 New York supplement second 947. Another case standing for the same proposition is Anna Malik versus the New York Liquor Authority 30 AD second 1040 and also in the matter of Finn's Liquor Shop, Incorporated versus the (p. 16) State Liquor Authority, 24 New York second 646, 647, excuse me.

For a minute, let's go the administrative procedures act, which is the act which vests power in this board to do exactly what they are doing today. Under Section 42-35-10 of that particular statute, it states, "Rules of evidence as applied in civil cases in the Superior Court shall be followed." This section makes pertinent 9-19-25 of the Rhode Island General Laws which states, "In the trial of any action in a court of this state, no evidence shall be admissible with the same shall have been procured by, through in consequence of any illegal search and seizure as prohibited in Section 6 of Article 1 of the Constitution of the State of Rhode Island.

We have a detailed decision by Judge Carrelos which indisputedly knocks out both of these indictments for two reasons. One reason being lack of probable cause as evidenced by the warrant being deficient on its face and also

because certain procedures went out followed by the police officer, reference to knocking on the door. For those reasons Judge Carrelos threw out both indictments and the cases were dismissed.

I would suggest to this court that this body should not only pay homage to that decision but should be bound by it.

MR. PASTORE: Mr. Morraco, in essence the arguments you and your brother counsel put forth, was this presented locally? Was this presented at the local licensing board hearing?

(p. 17) MR. ABATUNO: It was not, your Honor. Because of the fact that at that time, Mr. — the two people we talked about, Mr. Morett and Mr. Benoit, had been arrested, but not indicted. Now, we have a procedure that's been changed in this State and the men in which —. Before an indictment is issued, the people are arrested. They are placed on bail so they won't leave the state. The Grand Jury considers whether or not they should be indicted based upon testimony and so forth, an indictment issues.

At the juncture where we were at, at the time of the hearing, Mr. — one of them had been arrested, the other one had not. Neither had been indicted at that point. So, the first one had not been presented at the hearing. The burden at this hearing was not on the state as it is here. It was improper placed upon the license holder. They said, "All right. You have a notice that tells you that your license should be suspended. Now, go forward." This is not by me. This is not Russia. The license holder is innocent until proven guilty. They said, "Go ahead. If you want to present evidence, or else you'll be —." I said,

"All right. You leave me no choice." So I called the Chief of Police under the adverse witness statute. And he testified, "No, there was, there was arrest, a warrant, "but he doesn't believe there was indictment but he thought it would be coming out any day. He was even certain whether or not there was an indictment of anybody at that time.

MR. PASTORE: So basically the decision (p. 18) was made following an arrest of certain people?

MR. ABATUNO: There was arrest of at least one person.

MR. PASTORE: Okay. And basically, following that arrest and allegedly finding merchandise in the place, this was what the Council had to work with, Arthur, to make a decision.

MR. MURPHY: That is correct.

MR. PASTORE: I'm just trying to reconstruct and I, you know —

MR. HINES: That's how I see it, too. I think the more important question at this point is, the procedure point that Arthur brought out. Supposing you are right and that you didn't get a renewal of your license in 1978 and we —

MR. ABATUNO: That's a different — an entirely different question.

MR. HINES: — listen to me please. And we do find in your favor as a result of this hearing that the revocation was not rightful. Where does it put you except to make a new application for a new license. Am I wrong?

MR. ABATUNO: I disagree with you, yes. I don't say you're wrong, but I disagree with you. If you read the statute on revocation, it says that all rights of a li-

censee are terminated and once there's a suspension, there's no further — I'm looking for the law of suspension, five —

(p. 19) MR. PASTORE: Sergeant, bear with us. That's as good a seat as anywhere else. We're very interested here at this point in reconstructing this matter.

MR. MURPHY: 3-5-23.

MR. ABATUNO: No, I'm looking for the statute. I have a copy of it here.

MR. PASTORE: Let's go off the record for one moment with your understanding, Arthur. Counsel, let's go off the record.

(Off the Record)

MR. PASTORE: We're back on the record. A little conversation while he's researching his files. You know, John and I, Mr. Hines and myself, in briefly trying to come to some understanding with this matter, quickly and readily see that the job that we have as we see it, Mr. Murphy, is that we have to pretty much look at the action of the Council at the time they acted to see if they acted, let's say reasonably and properly at that particular time that the facts and the situation as it then stood. This is pretty much what our job is going to be, so a lot of where we're going it appears now becomes a bit superfluous to our decision. This is how I'm looking at it right now, John. And unless you see it differently, Murph or Mike.

MR. MURPHY: You know, I felt this way June 7th when I was up here for the regularly scheduled hearing. And, you know, I'm not uncomfortable with my record below.

MR. PASTORE: Michael, again, I mean —

(p. 20) MR. MURPHY: I have some procedural things I'd like to bring out —

MR. PASTORE: Yes. But let's come to this understanding. Now, essentially in reviewing this case, we have to look at the time that the decision was made which would go back to March, Mike, and the facts in the situation at that particular time. I mean, I don't see how we can draw everything else into it that is being put before us right now. I'm finding it difficult to understand the value of that to make a decision of this revocation. There might be another path you have to take for that ruling.

MR. ABATUNO: Mr. Hines asked me a question and I've looked around and I've found the answer. The end of 3-5-23 was talk about revocation says, "In case such license is revoked, such licensed person after such revocation shall cease to have any authority under said license and shall be disqualified from holding any of the licenses provided for in this title for a period of five years." This means to me that for a period of five years, where as it was we spent $600 for this license and held it from December to March. No rebate has ever been furnished and I'm sure there's none alleged. To spend $600 a year for each year would have been throwing away money without the use of the license.

MR. HINES: But Mike, I'm asking this. I'm looking at remedy more than — maybe I'm a little immature in it. But if we do find in your favor and — what do we say? We say they were wrong in a revocation (p. 21) and we reinstate it and for 1977? And what about the renewal for '78? We're not a superimposed licensing authority, I don't think to do that.

MR. ABATUNO: I feel that in equity a judgment would have to be made between the license holder and the Town licensing authority, to pay the difference on — mind you if they're held to be wrong, they are obliged to grant them. Mind you, this business has been out of business since the day of that revocation. Think of the loss of profits that have been inured.

MR. HINES: That's not within the framework of our remedy.

MR. ABATUNO: I realize that. By the same token — I've answered your question. But for five years we were not eligible to even file an applicatnon.

MR. HINES: At the conclusion of the hearing, would you speak to the question of the remedy that you're seeking? Not now, at the conclusion, if you don't mind. I see some problems with that.

MR. PASTORE: Yes. I don't know how far we can go in that direction. You're quite right. Then again, we might be wandering in a direction that is not meant to be anyway. Let's get back to the time that the Council sat down and made a decision.

We have the Sergeant here and we got the Sergeant to the point where there was an illegal search, as I understand it. Now, it's going to get exceedingly difficult at this point. Obviously, Arthur, to go forward (p. 22) with the Sergeant's testimony, unless you have some thoughts on the matter.

MR. MURPHY: Well, it depends how this board rules. If the board rules that the Sergeant, you know that they going to apprise the period that Angelo opposes and exclude all evidence, that's the end of our hearing *de novo*. But you still have in front of you what the Council did.

And I'm not uncomfortable with that record. The record shows what was found in there and you know if — if the Sergeant wants to testify, he can testify —

MR. PASTORE: Of course, Mike disputes that which we understand. The record is here and of course the record is — he objected to the record to begin with, but we got, with exception noted, we got it before us and basically we think we understand why the Council did what they did. They looked at merchandise, they looked at arrests they put everything together and say, "Okay, this is not how we want a licensee to function," and then he said, "Four to three," as I understand it here, revocation. That's basically how it went. Now, since then there's an awful lot of water's gone over the dam which you're bringing forward now and, you know, I'm just wondering if it's — Well, what is it, John, at this point. We've gone far beyond, I think, the situation or the facts that we need to make a decision — make a decision. This has a bearing but I'm wondering if this is the right forum for that.

MR. MURPHY: I think it does have a bearing because it does go to the issue of whether their (p. 23) license has expired, whether they have waived or lost any right that they might have had.

MR. HINES: That's your second argument.

MR. MURPHY: That . my second argument.

MR. HINES: Basically why I think — I think Mr. Abatuno's position is well taken about the exclusionary rule. I tend to agree that it does pertain and I would suggest that we so rule. If that be the case then, Mr. Murphy, I think your position would be to rest on the record you have submitted and then proceed which we've accepted for

what it's worth. And then proceed with your procedural argument.

MR. MURPHY: I have a couple of procedural arguments which I would like to develop.

MR. HINES: Is that satisfactory?

MR. PASTORE: I think this would be the fair way to go and I think we can excuse the Sergeant, unless there's any —

MR. MURPHY: If that's the Commissioner's ruling, you know, the Administrator's ruling, that's the ruling.

MR. PASTORE: This is the ruling, Frank. We are, Arthur and I —

MR. MURPHY: For the record, I'll take an exception.

MR. PASTORE: Okay. For the record, your exception is noted. Sergeant, maybe you can view this from another chair. It's just as comfortable down there. Thank you, you're excused.

(p. 24) Okay. Let's get into the next issue, Arthur, which is essentially is now what?

MR. MURPHY: Procedural.

MR. PASTORE: What happens to the—what happened to the license, the status of the license and so forth.

MR. MURPHY: I just want to call the Town Clerk to the stand, if you will.

MR. PASTORE: Your full name and address, please.

MR. FRENCH: William Joseph French, 57 Fir Avenue, Tiverton, Rhode Island.

(William J. French, sworn)

MR. MURPHY: May I have a moment, please?

MR. PASTORE: Yes. Off the record for a moment, please.

(Off the Record)

MR. PASTORE: Yes, we're on the record now. Yes, Mr. Murphy. You may be seated, Mr. French.

Examination by Mr. Murphy

Q. You are the Town Clerk of the Town of Tiverton?

A. I am.

Q. And were you the Town Clerk at the commencement of this hearing on March 28th, 1977?

A. Yes.

Q. And you have continued in that capacity as a Town Clerk?

A. Yes.

Q. As Town Clerk, did you at my request search your records (p. 25) for the application of license—excuse me, for license—liquor license renewals in October of '77?

A. Yes.

Q. Were you able to locate a renewal application by the Attic Lounge, Inc.?

MR. ABATUNO: I object.

MR. PASTORE: What's the purpose of the objection?

MR. ABATUNO: Because of the same section I just quoted for Mr. Hines.

MR. HINES: Will you stipulate that there wasn't such an application made?

MR. ABATUNO: Was not and could not.

MR. PASTORE: Well, was not, but could not, you can explain. But was not—what you're trying to do is get in the record.

MR. MURPHY: I will show that it wasn't—that they didn't do it.

MR. PASTORE: There was no renewal.

MR. ABATUNO: I will stipulate that we did not renew because we were under the impression we could not renew while this appeal was pending until you made a decision. If you sustained it, the revocation, under those circumstances--five more years from the date of that—retroactive to the day of revocation, there would have been a—

MR. PASTORE: The bottom line answer is, you did not renew.

MR. ABATUNO: Did not renew.

(p. 26) MR. PASTORE: Do we need anything further of Mr. French?

MR. MURPHY: A couple of things.

Q. Mr. French, I show you an abstract of the Council Meeting of April 11th, 1977 and ask you if you recognize it?

MR. ABATUNO: I would object. It has nothing to do with whether or not the Town Council properly revoked this license. It's after the day.

MR. PASTORE: Well, I'm in the dark here. What are talking of. We're talking about—

MR. PASTORE: Well, I'm trying to show and I'd like to be able to show this. That subsequent to the revocation, there was another application—

MR. ABATUNO: No, now wait a minute. There's no evidence about another application.

MR. PASTORE: Well, he's trying to bring this forward. Is this something, John? I think we'd be interested in this.

MR. HINES: Yes, sir.

MR. PASTORE: Yes, we'll let him proceed with this, Michael. Go ahead, Arthur.

MR. ABATUNO: I object. Take an exception.

MR. PASTORE: Exception noted.

Q. Mr. French, is that a true and accurate copy of the record of the meeting of April 11th, 1977?

A. From our records, yes.

Q. Mr. French, I show you, or do you have in your possession a copy of a liquor license application dated March 15th, 1978?

MR. ABATUNO: Excuse me. What Mr. (p. 27) Murphy just presented was not in fact an application for a license. He presented what was a proposal limiting liquor licenses. That's what that was.

MR. PASTORE: You know, this business you're talking on April 11th, Arthur, is something that, again you know, we're in the dark. We'd like to see what we're talking about here. It's been attested to, it took place, right?

MR. MURPHY: I'm jumping ahead of myself.

MR. PASTORE: All right. Let John and I examine this for a moment. Let's go off the record.

(Off the Record)

MR. PASTORE: Essentially, this Council Meeting of May 9th, what I see here is that there was a motion passed, four to three in limiting Class BV liquor licenses.

MR. ABATUNO: Wait a minute. You're looking at May 9th. I don't have that. It's April 11th of 1977.

MR. PASTORE: Okay. Now, wait a minute. The Council Meeting of April 11th, 1977, excuse me. That's correct. Well, what's the purpose of this, Arthur? Where are we going?

MR. MURPHY: The purpose of this is to lay some foundation to show that there was an application for a liquor license made for this same premises in March of 1978. It is my proposition that this buttress is my theory that they kissed this former license good-bye because—

(p. 28) MR. PASTORE: That's your position.

MR. MURPHY: That's my position. That's all I'm trying to show. It's up to you to decide what to do with it.

MR. ABATUNO: We wouldn't be here today if we had kissed it good-bye.

MR. PASTORE: Okay. I'd be interested in your response where this is concerned.

MR. MURPHY: They kissed it good-bye until Carrelos pulled it out of the hat.

MR. PASTORE: My goodness, we had poison fruit and now we have kisses. This is a very interesting hearing this morning. Well, did you kiss it good-bye, Mike?

MR. ABATUNO: Absolutely not.

MR. PASTORE: Absolutely not.

MR. ABATUNO: First of all was it May—March 27th or March 28th, the day of the revocation?

MR. PASTORE: 28th.

MR. ABATUNO: 28th of March. Now, the 28th of March of 1977 they revoked this license. And then they tried to nail the door closed so we won't be able to walk back in even if it was sustained here after the hearing on this appeal by saying, whatever the number is right now, that's it. And they try to freeze us out. But I humbly suggest that what they tried to do is not legal. They can't do that. If we have a license and its revoked (p. 29) illegally and you sustain the fact that our contention is that it was revoked illegally, they can't close the door to us coming back in because of some action taken by the Council on April 11th, 1977.

MR. PASTORE: You have a point. In fact, Michael, when you and John, Mr. Hines and yourself, were discussing that back and forth, that's an interesting question. What happens if we overturn the Town? What happens to that revocation? Well, then the license is no longer re-

voked and it would appear to be a license there. I mean, it just didn't disappear.

MR. MURPHY: No question about that. If we're wrong and you own a license—

MR. PASTORE: There's a license there.

MR. MURPHY: —and you overturned a revocation, the license is there.

MR. PASTORE: Okay. Now what's your procedural point, that this—

MR. MURPHY: My procedural point is that they came in and they applied again in March of '78.

MR. ABATUNO: Who did?

MR. MURPHY: The Cabaret.

MR. ABATUNO: The Cabaret Inc. is not Attic Lounge, Inc. That's a different corporation.

MR. MURPHY: Thank you. I'll excuse the Clerk and I'll withdraw that Exhibit.

(p. 30) MR. PASTORE: Okay—

MR. MURPHY: The one that—

MR. PASTORE: The one that has to do with the freeze. It appears that no one's lasting in that chair too long. I've got to say that, you know. You're excused, Mr. French. Thank you.

MR. MURPHY: Okay. My last procedural point, may I?

MR. PASTORE: Yes. I can't wait, Arthur. Some of these points are very, very interesting. What have you got now?

MR. MURPHY: I hope I saved the best for last because this thing has been pending for 14 months and during that 14 months, the Secretary of State has revoked the Charter for the Attic Lounge, Inc. I have a motion to dismiss presented to the Council and the Administrator. And I think it's dispositive. They have no standing for appeal, they're gone.

MR. PASTORE: Has your—is the counsel, that is counsel for the Appellant, has he had an opportunity to take a look at this?

MR. MURPHY: A gave it to him right now.

MR. PASTORE: Okay. Let's, let's listen to Michael. We'll reserve decision for the moment here. Let's listen to Michael. Michael, how do you view this?

MR. ABATUNO: First of all, the action to forfeit the Charter is usually or one of the ways of doing it is if there are any reports not filed when they're (p. 31) due. There were in fact three annual reports overdue. There were in fact filed. Mr. Callahan is here. He has prepared them and he has filed them. There is a penalty of $25.00 that is paid over and above the $15.00 fee, the filing fee. I am led to believe that that has also been paid.

MR. MURPHY: This is dated July 5th, 1978.

MR. ABATUNO: Well, then the left hand does not know what the right hand is doing up at the State House because I'm led to believe that it has been taken care of approximately two weeks ago. Am I right, Mr. Callahan?

MR. CALLAHAN: The papers were prepared and the annual reports were given to the President, Mr. Souza with the check and he was supposed to mail it unless it was longer than that.

MR. ABATUNO: Let me put it to six to seven weeks ago.

In the event that that Charter is dead and cannot be revived, I would say that would be the end of the license. But I would ask in the same manner that Mr. Murphy asked for a postponement of one week to allow him to prepare because he assumed we were here on a question of the opening. This is something new, it's new to me. It's found on me. Just now it is found on the Commissioner.

MR. PASTORE: Well, he certainly saved the best for last, didn't he, Michael?

MR. ABATUNO: Yeah. Yeah, he did. You have to wait, you have to admit that.

(p. 32) MR. PASTORE: It is new and you caught us all by surprise, Arthur. Shame on you, shame on you.

MR. ABATUNO: But, I feel that it's not dispositive because of the fact that—give us one week to cure this problem and I assure you that it will be cured, if it hasn't already been.

Mr. Callahan personally went to the State House. That Mr. Callahan the attorney for this corporation and in connection with the Massachusetts interests, I would presume to Rhode Island interests, personally went to the State House, picked up the forms, completed them for the three years in which they were in arrears and Mr.

Hines—Hines knows that four years is the point of no return. But three years can be salvaged by the payment of the fee prior to the—filing fees, and with the filing of the annual report and a $25.00 penalty without action or anyone, neither the Secretary of State nor anyone, the mere filing of these is sufficient.

MR. PASTORE: If you follow this course, any problem with a postponement, come back and try to finalize this thing, this might go on all summer long, Michael.

MR. ABATUNO: I wouldn't ask you to decide the case. Now, subject to our being able to furnish proof to you that this corporation is not faulty, then it is in good standing.

MR. PASTORE: Why couldn't we finalize the hearing and subject to, you know, at least that way (p. 33) we can at least complete the hearing. Because this coming back and forth, I think—

MR. ABATUNO: Yes. Without the necessity of all witnesses—

MR. MURPHY: I object.

MR. ABATUNO: Even Mr. Murphy.

MR. PASTORE: Yes. Okay, objection noted. But we'll allow that, Michael. That's not unreasonable, within seven days we can clear that up.

Arthur, anything else here. We have your latest bomb shell before us and it's in abeyance right now. Is there anything further, John?

MR. HINES: There is an Exhibit.

MR. PASTORE: Yeah. I feel now, we're going to Exhibit 9?

MR. HINES: No, ten and eleven.

MR. PASTORE: Ten and eleven. Yes, that would be the motion. This would be the Exhibit. We'll mark this number 10.

Arthur, anything further from the Town?

MR. MURPHY: I'm trying—for one second.

MR. PASTORE: Yeah. Okay, let's go off the record.

(Off the Record)

MR. PASTORE: We're on the record now. Again, we ask Mr. Murphy if there's anything further on behalf of the Town?

MR. MURPHY: I don't have anything (p. 34) further at this time.

MR. PASTORE: I think, in essence, then we've pretty much covered the waterfront. We can reserve decision subject to receiving the information which Mr. Abatuno said he would provide us within seven days. And, gentlemen, with your understanding we can close the hearing at this time and we'll be waiting for that information and a reasonable time after that we'll come to a hopefully fair and responsible decision.

Thank you, gentlemen. The meeting is closed.

CERTIFICATION

I do hereby certify that the foregoing, pages 1 through 34, is a true and accurate transcript of the testimony according to the electrical recording taken on July 6, 1978.

/s/ Ruth Jackson
Recording Technician

RHODE ISLAND GENERAL LAWS § 3-12-3 (1956, AS AMENDED)

3-12-3. *Entry on licensed premises — Arrest without warrant — Evidence of unlawful sales.* — The mayor and council of any city or the town council of any town, or either member thereof, or the chief of police of any city or town, or any police officer, or any constable specially authorized by said council or town council, or any member of the division of state police, or agent of the department of business regulation, may at any time enter upon the premises of any person licensed under the provisions of this title, to ascertain the manner in which such person conducts his business and to preserve order; and every such chief of police, police officer, constable or member of the division of state police, shall have the power to arrest, without a warrant, all persons found actually engaged, in the premises thus entered, in the commission of any offense in violation of any of the provisions of this title, and to keep such persons so arrested in custody until they can be brought before some magistrate (but for a period not to exceed twenty-four (24) hours) having the proper jurisdiction of such offense in the same city or town, to be dealt with according to law; and whenever any person is seen to drink any beverage in such premises, or in any part thereof, on any days or hours prohibited, under the provisions of this title, it shall be evidence that such beverages were sold and kept for sale by the occupant of such premises or his authorized agent.

Supreme Court, U.S.
FILED
NOV 8 1984
ALEXANDER L. STEVAS
CLERK

No. 83-963

In the Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON,
PETITIONER,

v.

LOUIS H. PASTORE, JR., in his capacity as
LIQUOR CONTROL ADMINISTRATOR of the
STATE OF RHODE ISLAND and
ATTIC LOUNGE, INC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

BRIEF OF THE RESPONDENT LOUIS H. PASTORE, JR.

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I

QUESTION PRESENTED

Does the exclusionary rule, which bars the admission in a criminal trial of evidence obtained by an illegal search and seizure, apply to a coexistent intrasovereign civil proceeding for sanctions or forfeiture of an alcoholic beverage license to exclude evidence determined to have been obtained pursuant to an unlawful search and seizure.

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

BRIEF OF THE RESPONDENT LOUIS H. PASTORE, JR.

Opinions Below

The opinion of the Rhode Island Supreme Court in the instant case is reported at 463 A.2d 161 and appears at pages A-1 to A-10 in the Petition for Writ of Certiorari. The opinion of the Providence County Superior Court appears in the Appendix accompanying this brief at page 11.

Jurisdiction

The decision of the Rhode Island Supreme Court was rendered on July 18, 1983. The Petition for Writ of Certiorari was filed on December 13, 1983, and the Writ was issued on July 5, 1984. The Court's jurisdiction to review the decision of the Rhode Island Supreme Court by Writ of Certiorari is conferred by 28 U.S.C. Section 1257(3).

Constitutional Provisions Involved

1. The Fourth Amendment to the Constitution of the United States.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. The Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also relevant are Rhode Island General Laws §3-7-21; §42-35-9; §42-35-10; §42-35-14 and §42-35-15, each of which appears in the Appendix to this brief.

Statement of the Case

By granting certiorari in this case, this Court has agreed to review a decision of the Rhode Island Supreme Court, which decision in turn was a review of a lower Rhode Island court decision pursuant to a Certiorari Petition requested by the Board of License Commissioners of the Town of Tiverton, Rhode Island. In Tiverton, as in other Rhode Island cities and towns, the Town Council serves as a Board of License Commissioners for the purpose of granting, renewing, suspending, or revoking liquor licenses within the town. In March of 1977, Respondent, the Attic Lounge, Inc., was a duly licensed liquor-serving establishment within the Town of Tiverton. On March 11, 1977, several Tiverton police officers entered the Lounge pursuant to a search warrant and found stolen property (clothing) on the premises. As a result, two actions were initiated. Criminal proceedings were initiated against individuals associated with the Attic Lounge by the State of Rhode Island for possession of stolen property. At the same time, the Tiverton Town Council, acting as a Board of License Commissioners, revoked the bar's liquor license pursuant to Rhode Island General Laws §3-5-23 after a hearing at which evidence of the finding of the stolen property was presented. Rhose Island General Laws §3-5-23 provides for the revocation of a liquor license where a license holder permits any of the laws of the State of Rhode Island to be violated on the licensed premises. (R.I.G.L. §3-5-23 is recited in full at A-11 in the Appendix accompanying the Petition for Writ of Certiorari). The criminal proceedings were ultimately dismissed after a judge of the Rhode Island Superior Court (Rhode Island's criminal trial court) held that the search warrant obtained by the Tiverton police to search the Lounge was defective.[1]

The principals of the Attic Lounge, Inc., appealed the revocation of the Lounge's liquor license to Respondent, Louis

[1] The trial court's decision is unreported.

H. Pastore, Liquor Control Administrator for the State of Rhode Island. Pursuant to R.I.G.L. §3-7-21 The Administrator held a *de novo* hearing on July 6, 1978, and received undisputed evidence that a conviction for possession of stolen property had never been obtained against any individual associated with the Lounge.[2] The Administrator, believing that a conviction was necessary in order for a town to assert the provisions of R.I.G.L. §3-5-23 reversed the revocation of the Lounge's license and ordered that the license be reinstated.

Thereafter Petitioner filed an appeal to the Providence County Superior Court pursuant to the Administrative Procedures Act, R.I.G.L. §42-35-15[3] which affirmed the Administrator's ruling. The Superior Court held that the Administrator had erred in holding that a conviction was necessary to revoke a liquor license pursuant to R.I.G.L. §3-5-23. However, the Court held that because evidence of the stolen property at the Attic Lounge premises had been obtained pursuant to an invalid search warrant, the exclusionary rule barred the presentation of such evidence before the Board of License Commissioners which could not therefore rely upon it in revoking the Attic Lounge's liquor license.

Petitioner then filed a Petition for Writ of Certiorari with the Rhode Island Supreme Court seeking review of the Superior Court's decision. That petition was granted by the Rhode Island Supreme Court which reviewed the Superior Court's decision and affirmed the holding that the exclusionary rule ought properly to be extended to municipal liquor license revocation proceedings.

The Rhode Island Supreme Court in its decision discussed the genesis of the exclusionary rule, (which bars the admission

[2] The hearing is civil in nature and is governed by the Rhode Island Administrative Procedures Act, so-called, §42-35-9, §42-35-10, and §42-35-14. (R.I.G.L. Sections referred to are recited in full in Appendix B hereto.) (R.I.G.L. §3-7-21 is recited in full in Appendix A hereto).

[3] R.I.G.L. §42-35-15 is recited in full in Appendix C hereto.

in a criminal trial of evidence obtained by an illegal search and seizure) in *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and its later extension to state criminal trials in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The acceptance of this rule in Rhode Island is symbolized by the enactment by the Rhode Island General Assembly of Rhode Island General Laws §9-19-25 (A-12 in Appendix in Petition for Writ of Certiorari) which codifies as an evidentiary rule in criminal trials in Rhode Island the provisions of *Weeks* and *Mapp*.

The Rhode Island Court first determined that the *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) decision stood for the proposition that the exclusionary rule should apply to proceedings that are " 'quasi-criminal' in character" and concluded that a hearing of suspension or revocation of an alcoholic beverage license was of such a quasi-criminal character to which the exclusionary rule applied.

The Rhode Island Court then referred to this Court's decision in *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) in weighing the extent to which the application of the exclusionary rule to an administrative alcoholic beverages hearing would deter illegal searches and seizures. After examining various State Court decisions on this point, particularly *Finn's Liquor Shop* v. *State Liquor Authority*, 25 N.Y. 2d 647, 249 N.E.2d 440, 301 N.Y.S. 2d 584, *cert. denied*, 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969), the Rhode Island Court found that indeed on balance there was a deterrent effect and held that a Board of Liquor License Commissioners should not be permitted to avail itself of the fruits of an illegal search in order to impose sanctions upon the persons whose constitutional rights have been violated.

The Rhode Island Supreme Court considered this Court's decision in *United States* v. *Janis*, 428 U.S. 433, 96 S.Ct. 3021,

49 L.Ed.2d 1046 (1976), where this Court declined to extend the exclusionary rule to civil proceedings that were intrasovereign in nature. The Rhode Island Court, however, distinguished *Janis* by recognizing the case before it as being intrasovereign and reasoned that in any event, "the potential deterrent effect of the exclusionary rule on the agents of an intrasovereign agency is strong enough to outweigh the costs to society of refusing to admit evidence obtained in violation of constitutional imperatives."

The Rhode Island Court in reaching its decision cited as support for this intrasovereign distinction the decision of *Lopez-Mendoza* v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983), a decision which was later reversed by this Court on other grounds[4] in its 1983-1984 term. *Immigration and Naturalization Service* v. *Lopez-Mendoza*, 52 USLW 5190 (1984).

In reaching its decision, the Rhode Island Court pointed out that in other instances, distinguishable from the one before it, the deterrent effect of applying the exclusionary rule was on balance outweighed by the societal costs involved.[5]

Summary of Argument

The exclusionary rule was first enunciated in *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and later extended to state criminal trials in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1801 (1961). Appropriate extension of the rule beyond criminal trials has

[4] The Rhode Island Court referred to and relied upon *Lopez-Mendoza* as concerns the intersovereign distinction enunciated in *Janis* in determining that in such a situation the exclusionary sanction is maximized since the offending officer and the prosecutor share a common goal. *Lopez-Mendoza* was reversed because the Court in applying the *Janis* balancing test to the benefits and costs of excluding concededly reliable evidence from a deportation proceeding the costs outweighed the deterrent benefits.

[5] *State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978), a probation-revocation hearing; and *Bridges* v. *Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978), a bail-revocation hearing.

been a frequent issue for this Court to resolve. In the first few years following *Mapp*, resolution of this issue was generally in favor of extension. *Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1169 (1960) extended the rule to evidence obtained illegally by state authorities which was offered for use in a federal criminal proceeding.

In *One 1958 Plymouth Sedán* v. *Commonwealth of Pennsylvania*, 380 U.S. 693, 854 S.Ct. 1246, 14 L.Ed.2d 170 (1965), this Court held the rule required exclusion, in a civil forfeiture proceeding, of unlawfully obtained evidence. This non-criminal extension of the rule was justified by the Court in being applied to a proceeding civil in form, but deemed criminal in nature since the end result of the proceeding was forfeiture of a man's property by reason of prior criminal offenses. Later, in *United States* v. *Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 Lawyer's Edition 2nd 1046 (1976), this Court again dealt with the question of the civil application of the rule. In *Janis*, this Court determined that evidence seized by a state criminal law enforcement officer in good faith, but nonetheless in an unconstitutional manner, is admissible in a civil proceeding brought by or against the United States. In doing so, this Court held that extension of the role was not appropriate in "intersovereign" circumstances. The Court also recognized in *Janis* that in deciding in what types of proceedings application of the exclusionary rule is appropriate, one must weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs.

This case presents to the Court the issue of whether the exclusionary rule was properly applied to a municipal liquor license revocation hearing. Respondents believe that the determination of application and exclusion was appropriate inasmuch as the revocation proceeding is "quasi-criminal" in nature and also because the intrasovereign nature of the matter clearly warrants it. The hearings held on the issue of revoking such a license are contested and adversary in nature. (See

R.I.G.L. §42-35-14; §42-35-9; and §42-35-10 each of which are set forth in Appendix "B" to this brief). It is a proceeding pursuant to R.I.G.L. §3-5-23, to punish the holder of the license for past conduct that is unlawful. Therefore, the nature and character of the hearings under this statutory framework are "quasi-criminal" and the exclusionary rule is therefore properly extended to them.

To this backdrop of a "quasi-criminal" action, the balancing test enunciated in *United States* v. *Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) and *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) must be applied to determine whether the benefit of deterrence resulting from exclusion outweighs the social costs relevant to the law enforcement system.

In utilizing this balancing process, it is significant that the instant case, unlike *Janis*, *supra*, involves an intrasovereign proceeding. The Tiverton Police Department obtained the initial warrant to seize the goods (clothing) in question. The very same police officers testified at the license revocation hearing with regard to the evidence unlawfully seized. Under these circumstances, it is the local police officer who is the primary object of the sanction. It is his conduct that is to be controlled. When an offending officer and the prosecutor share a common goal, the deterrent effect of the exclusionary sanction is maximized.

On the other hand, the social costs of excluding the evidence are not significant or substantial. As is nearly always the case with the rule, relevant and reliable evidence would be rendered unavailable. However, as a practical result, the end result here is that the licensee retains his right to remain in business; a business unrelated to and not co-existensive with the unlawful evidence. As a licensee, he is still fully subject to the usual local regulation of his business activity in the ordinary course. This attenuation on the cost side makes it unlikely that any significant, much less substantial, costs are involved as a result.

In reaching its decision in this case, the Rhode Island Supreme Court took into account and weighed the social benefits as compared against the likely costs. In so doing, the Rhode Island Supreme Court determined that the deterrence value of the exclusionary rule in the context of the case was substantial. The Rhode Island court, in making this determination properly accorded great weight in the balancing process to the policy emphasis in *Mapp* that the deterrence of police misconduct and the policy that the government should not benefit from its own wrong-doing ought to be accorded great weight.

Moreover, the Rhode Island Supreme Court indicated in its decision that it is keenly aware of the weight that should be given in the balancing process as concerns two unrelated areas where they determined not to apply the exclusionary rule. *State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978); *Bridges* v. *Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978).

Various other State Court decisions have clearly decided the same issue in favor of the position adopted by the Rhode Island Supreme Court. *Commonwealth Liquor Control Board* v. *Mottola's 51 Tavern, Inc.*, 37 Pa. Cmwlth. 234, 389 A.2d 1213 (1978); *Pennsylvania Liquor Control Board* v. *Leonardziak*, 2 110 Pa. Super. 511, 233 A.2d 606 (1967); *Finn's Liquor Shop* v. *State Liquor Authority*, 301 N.Y.S.2d 584, 249 N.E.2d 440 (1969), *cert. den.* 396 U.S. 840 (1969); *Leogrande* v. *State Liquor Authority*, 269 N.Y.S.2d 433 (1966). The aforementioned cases are strikingly similar in nature to the instant case, and the decisions in each of those cases strongly support the reasonings adopted by the Rhode Island Supreme Court.

In *Janis*, the Court's decision not to extend the exclusionary rule to an intersovereign setting resulted in no small part from the lack of empirical proof that the exclusionary rule actually is a substantial and efficient deterrent. However, due to the comparatively late judicial creation of the exclusionary rule, it is submitted that the jury is still out on that question and we

must therefore assess the rules efficacy over the long term in order to have it work its intended goal.

Moreover, the recent decision of this Court in *Immigration and Naturalization Service* v. *Lopez-Mendoza*, 52 USLW 5190 (1984) where reference was made to the comprehensive scheme of the INS for deterring Fourth Amendment violations by its officers indicates that the exclusionary rule does have the desired deterrent effect upon law enforcement officials. Furthermore, a recent three-year study of the search warrant process in seven United States cities determined that the exclusionary rule does serve as a disincentive to police officers to misuse or abuse their authority. This yet-unpublished study, prepared for the National Center for State Courts, is additional empirical proof of the efficacy of the rule.

Argument

I. THE EXCLUSIONARY RULE IS PROPERLY EXTENDED TO AN INTRASOVEREIGN CIVIL ADMINISTRATIVE LIQUOR LICENSE REVOCATION PROCEEDING TO EXCLUDE EVIDENCE RELEVANT TO THE LICENSE PROCEEDING WHERE THE EVIDENCE HAS ALREADY BEEN SUPPRESSED IN A CRIMINAL FORUM DUE TO THE UNLAWFULNESS OF THE SEARCH AND SEIZURE OF THAT EVIDENCE.

A. "The personal and individual goals of the several leaders of the American Revolution were varied, but there was an overwhelming consensus about securing for the people a body of rights, painted with a broad brush in the Declaration of Independence. In his characteristically persuasive language, Justice Louis Brandeis declared in his famous dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438 (1928):

> 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.' "

McCree, Jr., *Civil Liberties and Limited Government*, National Forum, Fall, 1984, at 39.

In part to protect this "right to be let alone," the Constitution was duly amended to include the Fourth Amendment prohibition against unreasonable searches and seizures. In order to meaningfully implement that prohibition and to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..." the exclusionary rule was adopted. The primary purpose of the exclusionary rule is to prevent and deter present and future unlawful governmental conduct, chiefly police conduct, and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

Initially, the exclusionary rule was considered to be broadly applicable against all unreasonable searches and seizures under the guise of law.

"The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the unreasonable searches and seizures under the guise of law.... The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures...should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all constitutions have a right to appeal for the maintenance of such fundamental rights....

This protection is equally extended to the action of the Government and officers of the law acting under it.... To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against unauthorized action." *Weeks* v. *United States*, 232 U.S. 383, 391-392, 394 (1914).

This broad application resulted, in part, from the then belief that basically there were but two courses to follow, to exclude or not to exclude. This belief is typified by Mr. Justice Holmes' dissent in *Olmstead:*

> "[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained.... We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.* at 470.[6]

Presently, it would appear that the application of the exclusionary rule depends solely upon whether its application in a particular type of proceeding will significantly further the goal of deterrence.[7] In making this determination, the Court has developed a balancing test to weigh the potential injury or cost to society as against the potential benefits of deterrence. *United States* v. *Calandra*, at 349-350; *United States* v. *Janis*, at 453-454. *Immigration and Naturalization Service* v. *Lopez-Mendoza*, 52 USLW 5190 (1984).

B. Admittedly, it has become a difficult task "to demarcate the seemingly inexhaustible reach of the exclusionary rule." *People* v. *McGrath*, 412 N.Y.S.2d 801, 804, 35 N.E.2d 541, 543 (1978), however, the constitutional mandate of the Fourth Amendment requires that the task be undertaken. The application of the exclusionary rule beyond that of a criminal proceeding to a civil matter is of fairly recent vintage.[8] For the first time, this Court has dealt squarely with this question in

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[6] This belief stated by Mr. Justice Holmes came to be associated with the 'imperative of judicial integrity' commented upon in *Elkins* v. *United States*, 364 U.S. 206, 222 (1960). However, this "imperative" has apparently since been either abandoned or shunted aside. See, *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

[7] This perspective is made clear by Mr. Justice Blackmun in *Janis* where he states:

> "The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the court has noted in recent cases, this inquiry is essentially the same so the inquiry into whether exclusion would serve a deterrent purpose." (Citations omitted). *Ibid.* at 459 fn. 35.

[8] In *Janis*, the majority opinion noted that "the Court never has applied it to exclude evidence from a civil proceeding, federal or state." (Footnote omitted) *Ibid.* at 447. The Court further remarked at 456 that "The seminal cases that apply the exclusionary rule to a civil proceeding involve 'intra-sovereign' violations...."

the case of *Immigration and Naturalization Service* v. *Lopez-Mendoza*, 53 USLW 5190 (July, 1984). In *Lopez-Mendoza*, this Court at the outset acknowledged that a deportation proceeding "is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry...." (Citation omitted). After so characterizing the nature of deportation proceedings, this Court then proceeded at length to apply the exercise of balancing the likely social benefits of excluding unlawfully seized evidence against the likely costs as established in *Calandra* and *Janis*, supra.

In so doing, this Court determined that the application of the exclusionary rule is appropriate to certain civil proceedings. In other words, although this Court recognized that the deportation proceedings under review in *Lopez-Mendoza* were purely civil, nonetheless it went through the process of establishing and analyzing a balance sheet in accordance with the dictates of *Janis* to arrive at a result that the "*Janis* balance between cost and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS." *Lopez-Mendoza*, at 52 USLW 5195. As a result, *Lopez-Mendoza* does stand for the principal that the framework for deciding in what types of proceding application of the exclusionary rule is appropriate does indeed apply to purely civil matters.

Therefore, it is no longer subject to question that Federal agencies, charged with purely administrative responsibilities, just as those engaged in the enforcement of the criminal law, must conduct their investigative and enforcement functions in compliance with constitutional requirements and, more particularly, within the confines of the Fourth Amendment. This is similarly applicable and extendable to State agencies as well. See, *Camara* v. *Municipal Court*, 387 U.S. 523, 530-531, 87 S.Ct. 1727, 18 L.Ed.2d 930; *See* v. *City of Seattle*, 387 U.S. 541, 87.

The instant case is a civil matter. However, unlike *Lopez-Mendoza*, it is not "a purely civil action to determine eligibility [to retain an alcoholic beverage license.]" It is a proceeding pursuant to R.I.G.L., §3-5-23, to punish the holder of the alcoholic beverage license for past conduct that is unlawful. The Town Council of the Town of Tiverton in sitting as a Board of License Commissioners to determine whether or not the Respondent's alcoholic beverage license should be revoked for the past unlawful conduct, has the power to either suspend or to revoke the license in question. In so doing, the Board of License Commissioners does both adjudicate guilt and punish the Respondent licensee for a criminal act related directly or indirectly to his licensed premises. Unlike the purpose of deportation, a license revocation hearing is structured and intended to punish past transgressions of the licensee. Certainly, such punishment has a prospective effect since if the license is revoked, then the licensee can no longer operate his business of selling and serving alcoholic beverages. However, unlike *Lopez-Mendoza*, this prospective effect does not lend itself nor can it be interpreted as being a continuing criminal act or crime.

As a result, the nature and character of the hearings of a local Board of License Commissioners pursuant to R.I.G.L. §3-5-23 are "quasi-criminal" in nature. The penultimate paragraph in §3-5-23 is further indication of the punitive nature of the local Board's decision of license revocation. It provides that under a revocation the licensee "shall be disqualified from holding any [alcoholic beverage license in Rhode Island] for a period of five (5) years next following such revocation. Moreover, the bond posted by the licensee is subject under §3-5-23 to be put in suit and "by due process of law the *penal* sum thereof shall be recovered for the use of said town or city." (Emphasis supplied).

This Court has previously determined and held that the exclusionary rule does apply to proceedings that are "quasi-

criminal" in nature. *Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U.S. 693, 854 S.Ct. 1246, 14 L.Ed.2d 170 (1965). In that case, the State of Pennsylvania sought to confiscate a vehicle pursuant to a statute that provided for the forfeiture of a vehicle carrying unsealed liquor. In collateral criminal proceedings, the owner was acquitted because of the exclusion of the illegally seized liquor. This Court held under those circumstances, that although forfeiture proceedings are essentially civil in nature, the exclusionary rule should apply. In so doing, this Court quoted with approval language from *Boyd* v. *United States*, 116 U.S. 616, 634, 6 S.Ct. 524, 534, 29 L.Ed. 746, 752 (1896), stating that:

> "if the Government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is civil in form,—can he by this device take from the proceedings its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one.... As, therefore, suits for penalties and forfeitures incurred by the commission are offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution...." 380 U.S. at 697-98, 85 S.Ct. at 1249, 14 L.Ed.2d at 173.

C. In this context of a quasi-criminal action, we must now undertake the balancing exercise enunciated in prior decisions of this Court to weigh the likely deterrent benefits of excluding the unlawfully seized evidence against the likely social costs.

Unlike *Janis*, the application of the exclusionary rule in this case is intrasovereign. It was a Tiverton Policeman, acting

pursuant to a search warrant, who entered the licensed premises of the licensee. It was the very same Tiverton Policeman who would appear and who testifed in both the criminal action and the quasi-criminal license revocation hearing proceedings with regard to the evidence unlawfully seized.[9] In evaluating the need for a deterrent sanction, the step is to identify those who are to be deterred. In this case, it is the local police officer who is the primary object of the sanction. "It is his conduct that is to be controlled." *Janis* at 448. Under these circumstances, the further application of the exclusionary rule to the quasi-criminal license revocation proceedings would certainly contribute further to the deterrence of unlawful conduct by the municipal police officers. Under these circumstances of an intrasovereign situation within the same close community of Tiverton, it seems likely that the deterrence value of applying the exclusionary rule in the license revocation proceedings is higher than it was in *Janis*.

As the Rhode Island Supreme Court stated in its decision,

> "Thus, exclusion for purposes of deterrence would be unjustified if admission of the evidence would be expected to encourage future illegal searches by such agents because of their expectation that *in any event* the evidence would be admissible in the administrative process." (Emphasis supplied). Appendix A-5 Petition For A Writ Of Certiorari.

And as this Court noted in *Plymouth Sedan* at 701,

> "It would be anomalous, indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the for-

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[9] The Joint Appendix at page 4 sets out the proceedings held before the Board of License Commissioners. The Tiverton Chief of Police testified at that hearing that "he had received a tip from the Fall River Police Department that there were stolen goods on the property of the Attic Lounge, Inc., 469 Main Road, Tiverton, RI, obtained a serach warrant, entered premises, and discovered stolen property."

feiture proceeding requiring the determination that the criminal law has been violated, the same evidence would be admissible." (Footnote omitted).

And in *Lopez-Mendoza*, 52 USLW 5193, it was similarly noted that: "As recognized in *Janis*, the exclusionary rule is likely to be most effective when applied to such 'intrasovereign' violations."

The reasoning on this point of the court in *Lopez-Mendoza* v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983) is equally compelling. They stated:

> "[When an] offending officer and the prosecutor share a common goal, the deterrent effect of the exclusionary sanction is *maximized:* An officer will have little incentive to violate the Fourth Amendment if he knows that tainted evidence will be worthless to the prosecutorial agency he serves." (Emphasis supplied) *Id.* at 1069.

This reasoning on the part of these cited cases is analogous to and in keeping with the concept originally stated in *Boyd* v. *United States*, supra, and weighs heavily on the benefit side of deterrence particularly in an intrasovereign situation of the kind presented here.

It is argued by Appellant that in the instant case, the seizing officer's primary objective would be to obtain the evidence for the purpose of a criminal prosecution and not for the collateral purpose of using that evidence in a civil license revocation proceeding. In response to that argument, it is Respondent's position that in an intrasovereign setting with quasi-criminal penalties, the assumption of the arresting officer's primary objective is not a strong consideration in determining the benefit of deterrence value of applying the exclusionary rule to the alcoholic beverage revocation proceeding. See *Boyd*, supra.[10]

[10] And as this Court stated in *Plymouth Sedan* at 700 fn. 7: "Nor has the continued validity of *Boyd* been in any way impaired by the decision of this Court in..." (Citations omitted).

The officer in question is from the Town of Tiverton and if an assumption is to be made, the reasonable inference would be that upon finding stolen goods upon the licensed premises of the Respondent that it would come to his mind that the licensee would be subject to having the local Town Council sitting as a Board of License Commissioners take action against his alcoholic beverage license. In this type of case where the seizure occurs upon the licensed premises in an intrasovereign situation, the criminal proceedings and the license revocation action are so parallel as to be basically equal in the minds of the intrasovereign agent. Most assuredly, the seizing officer was aware that as a result of the items seized upon the licensed premises that there would be action taken against the licensee and his license in addition to the expected criminal prosecution. "As recognized in *Janis*, the exclusionary rule is likely to be most effective when applied to such 'intrasovereign' violations, such as in the instant case." *Lopez-Mendoza*, 52 USLW 5193.

Along these lines, the Rhode Island Supreme Court in *Chernov Enterprises, Inc.* v. *Sarkas*, 109 R.I. 283, 284 A.2d 61 (1971) stated:

> "[Petitioner] completely ignores the established principal that a proceeding under the laws regulating the sale of alcoholic beverages is entirely separate and distinct from a criminal prosecution for the same offense, and that the two proceedings, rather than being interdependent or mutually exclusive, are co-existent. While one is in the nature of an action in rem, the other is against a licensee personally. Both may be instituted and pursued simultaneously or otherwise. *Id.* at 288, 64. See also *DiTraglia* v. *Daneker*, 83 R.I. 227, 115 A.2d 345 (1955).

And, as this Court noted in *Plymouth Sedan* at 701 fn. 11:

> "This Court in *Boyd* v. *United States*, supra, at 638, rejected any argument that the technical character of a for-

> feiture as an *in rem*, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defence; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offence."

Moreover, unlike *Lopez-Mendoza*, there are no other factors in the instant case which "significantly reduces the likely deterrent value of the exclusionary rule in an alcoholic beverage license revocation proceeding."

For example, a hearing before a local Board of License Commissioners on the matter of suspension or revocation is basically a full-blown adversary proceeding with the burden of proof being upon the Board of License Commissioners to establish by a preponderance of the evidence, sufficient cause to take action of revocation or suspension. *Chernov Enterprises, Inc.* v. *Sarkas*, supra. It is not a simple, streamlined proceeding such as utilized in deportation proceedings.

Additionally, the evidence in question in the instant case was essential and central to the burden of proof of the local Board of License Commissioners if in taking their action of revocation, this central core evidence was not susceptible of being obtained or gathered independently of the seizure. The record reflects that the alcoholic beverage revocation decision was based exclusively upon the evidence seized unlawfully. That evidence was the sole evidence upon which it was determined that the licensee should forfeit his property by reason of committing a criminal offense.[11] The Board could not establish

[11] The Rhode Island Supreme Court has determined that an alcoholic beverage license has the indicia of a property right. See *Vitterito* v. *Sportemen's Lodge & Restaurant, Inc.*, 102 R.I. 72, 228 A.2d 119 (1967); *Beacon Restaurant, Inc.* v. *Adamo*, 103 R.I. 698, 241 A.2d 291 (1968); and *R.I. Opthalmological Society* v. *Cannon*, 113 R.I. 16 at 24 fn. 5, 317 A.2d 124 (1974). Also see *In re Camelot Court, Inc.*, 21 Bankr. 496 (Bankr. D.R.I. 1982), it was held that a Rhode Island liquor license may be the subject of a valid security interest under the Uniform Commercial Code.

a basis for revocation without that evidence which is challenged as having been in violation of the Constitution. Nor could it be sufficiently attenuated from the original seizure.[12] We do do not have present the attenuation existing in *Janis*, 454 fn. 27. Instead, we have the man sought to be controlled holding two weapons both of which are equally tainted. This was recognized in *Calandra* where it was determined that:

> "In the usual context of a criminal trial, the defendant is entitled to the suppression of, not only the evidence obtained through an unlawful search and seizure, but also any derivative use of that evidence. The prohibition of the exclusionary rule must reach such derivative use if it is to fulfill its function of deterring police misconduct.

Nor does this case or a case of its kind present the practical considerations taken into account by the Court in *Lopez-Mendoza* which acted in that case to mitigate in the Court's opinion the likely deterrent value of the exclusionary rule.

Also, unlike the considerations taken into account on the benefit side in *Lopez-Mendoza*, we do not have a situation where the Tiverton Police and the local Licensing Board have any scheme, comprehensive or otherwise, for deterring Fourth Amendment violations by its officers.

Lastly, we do not have present here, as was noted in *Lopez-Mendoza* the element of the deterrent value of the exclusionary rule in alcoholic beverage license revocation proceedings being undermined by the availability of alternative remedies on the part of the licensee, 52 USLW 5193. In all actuality in this type of proceeding, the licensee has no other alternative available to him.

[12] The present case, although intrasovereign, is similar to *Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1169 (1960) where the Court indicated that the assumed interest of criminal law enforcement officers in the criminal proceedings of another sovereign counterbalanced the attenuation sufficiently to justify an exclusionary rule.

The weighing process in this type of situation was further refined in the *Lopez-Mendoza* decision when the Court indicated that "Deterrence must be measured at the margin." 52 U.S.L.W. 5193. In going to the margin in the instant case, the measure is clear that the deterrence value in applying the exclusionary rule to alcoholic beverage license revocation proceedings is considerable.

This alone, however, is not sufficient. To complete the balancing process, the social costs of applying the exclusionary rule to those proceedings must be determined and considered. It was determined by the Court in *Lopez-Mendoza* that a certain uniqueness existed on the cost side of the scale. That uniqueness was based upon the determination that to apply the exclusionary rule to deportation proceedings would permit, allow, or encourage "continuing violations of the law" in that the alien would be enabled to continue to remain within the United States unlawfully. There is no such uniqueness in the instant case. The items once seized by the Tiverton police officer left the business premises of the Respondent licensee, and, although their actual whereabouts are unknown, it is believed that those goods were not returned to the business premises. Therefore, we have a situation where there is not the unique factor of a continuing violation of the law by applying the exclusionary rule in the instant case.

Nor, do we have, as was determined to be present in *Lopez-Mendoza* an express public policy which would be clearly frustrated by application of the exclusionary rule to the revocation proceedings. The constable's blunder in the instant case does allow the licensee to continue in his business activity of selling alcoholic beverage licenses. But this does not allow him to continue in the commission of an on-going crime.

Further, as was decided above, the alcoholic beverage license revocation proceedings are substantially adversary and are not structured to be "deliberately simple" as does the deportation hearing system. Nor is a local Licensing Board in

the State of Rhode Island faced with a very large number of revocation actions. And, as was referenced in *Lopez-Mendoza*, "it is against this backdrop that the course of applying the exclusionary rule, like the benefits, are measured "at the margin." 52 USLW 5194.

Nor do we have in this case the sober assessment of the exclusionary rule's likely costs as presented by the agency in *Lopez-Mendoza*. No such basic fundamental concerns are put forward by the Petitioner in this matter. Instead, the Petitioner presents philosophical, theoretical, strictly legal considerations which are not specific empirical considerations that are required to support the analysis of benefit versus cost.

What then are the cost factors to be considered in this case? Basically, they are the same as those that were the focal point of the Court in *Janis*, specifically the loss of concededly relevant and reliable evidence. And what occurs as a result? The licensee is entitled to continue to hold his alcoholic beverage license and thereby continue his business. This could not even be interpreted as being a contraband situation as in *Plymouth Sedan*, supra. In the instant matter, there is no other cost to be placed upon the scales.

Thus, in these circumstances, the *Janis* balance between costs and benefits comes out in favor of applying the exclusionary rule in alcoholic beverage license revocation hearings held by a local municipality. To determine otherwise, "would be anomalous. . .to hold that in [a] criminal proceeding, illegally seized evidence is excludable, while in [a] forfeiture proceeding requiring the determination that the criminal has been violated, the same evidence would be admissible." *Plymouth Sedan*, 380 U.S. at 701, 85 S.Ct. at 1251, 14 L.Ed.2d at 175.

D. Additionally, other State Courts have clearly decided the same issue in favor of the position adopted by the Rhode Island Supreme Court. *Commonwealth Liquor Control Board* v. *Mottola's 51 Tavern, Inc.*, 37 Pa. Cmwlth, 234, 389 A.2d 1213 (1978); *Pennsylvania Liquor Control Board* v. *Leonardziak*, 1 110 Pa. Super. 511, 233 A.2d 606 (1967); *Finn's Liquor Shop* v. *State Liquor Authority*, 301 N.Y.S.2d 584, 249 N.E.2d 440 (1969), *cert. den.* 396 U.S. 840 (1969); *Leogrande* v. *State Liquor Authority*, 268 N.Y.S.2d 433 (1966). The aforementioned cases are strikingly similar in nature to the instant case, and the decisions in each of those cases strongly support the reasoning adopted by the Rhode Island Supreme Court.

As *Finn* and *Leonardziak*, supra, noted, the facts in the *Plymouth Sedan* case, supra, are not that different from the Liquor Control Cases involving the license itself. In both cases, there must be a determination that the criminal law has been violated before a penalty is imposed upon the licensee. In neither situation is the State Government seeking or entitled to compensation for damages. In both cases, it is the owner or license holder that is being penalized. The Supreme Court noted that the penalty of forfeiture would be higher than the highest fine possible. In the instant case, the license holder corporation is put out of business and its principals are deprived of its income, which is potentially a greater loss than any one of a number of criminal penalties; or at least not less severe.

As *Finn*, supra, noted, without the exclusionary rule there would be no meaningful deterrence to protect against harassment. The State could effect parallel sanctions in an Administrative Proceeding without being concerned about the legality of the police measures that were employed to obtain evidence. The Petitioners, naturally, raised the issue that there would be no additional deterrence from excluding the

evidence; however, *Finn*, supra, faced this question specifically and concluded that deterrence would be served if they refused to apply the exclusionary rule.

A number of State Courts as outlined, supra, have examined, in detail, the application of the exclusionary rule in liquor license revocation proceedings, and those courts which have passed upon this issue, have given due consideration to the question of balancing the considerations involved.

In view of the fact that the existing case precedent in this area, cited supra, is clearly in favor of the exclusion of the evidence, it is important to note the rationale employed by those Courts so deciding the issue. In *Leonardziak*, supra, at page 608, the court offers insight into its reasons for applying the exclusionary rule in cases of this nature:

> "The purpose of the exclusionary rule is to compel respect for the constitutional guarantee in the only effectively available way by removing the incentives to disregard it. The policy of deterring unconstitutional activity by suppressing evidence would not be served if police, after being barred from using evidence against a licensee in a criminal court, could use the identical evidence to punish with equal or greater severity through the machinery of the Liquor Control Board."

The Court in *Finn*, supra, went on to say at page 588:

> "...the exclusionary rule rests on a theory of deterrence; that policy would not be served if the illegal official activity could be used despite unavailability in criminal proceedings to effect parallel sanctions of forfeiture in an Administrative Proceeding."

For other cases validating the application and use of the exclusionary rule in Liquor Board Administrative Hearings, see *LaPinta* v. *New York State Liquor Authority*, 294 N.Y.S.2d 947 (1968); *Malik* v. *New York State Liquor*

Authority, 294 N.Y.S.2d 948 (1968); *People* v. *McGrath*, 412 N.Y.S.2d 801 (1978); and *McPherson* v. *New York City Housing Authority*, 365 N.Y.S.2d 862 (1975).

The Petitioner, in its brief, while recognizing the wealth of authority underlying the theory that the exclusionary rule is applicable to Administrative Liquor License Revocation Hearings, reasons that the holding of *Plymouth Sedan*, supra, is inapplicable to a proceeding involving a liquor license revocation. The Petitioner's theory, for this position, is that *Plymouth Sedan*, supra, addressed itself to a proceeding which was "quasi-criminal" in nature and that Rhode Island liquor license revocation matters are civil in nature. Even acknowledging that liquor license revocation proceedings are civil in nature is correct, the Court in *Plymouth Sedan*, supra, defined its use of the term "quasi-criminal" in such a way as to make its holding applicable to the case at bar. On page 701 of that decision, the Court stated, "...a forfeiture proceeding is 'quasi-criminal' in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." Accordingly, even if we are to assume that liquor license revocation hearing is civil in nature, we must, nevertheless, search behind the term "civil" to glean the ultimate effect of the proceeding itself. It cannot be contradicted that an adverse ruling from the Liquor Control Administrator will, indeed, result in the forfeiture of a valuable property right, and that this exacting remedy is nothing more than a penalty being imposed because of a violation of the law or of the guidelines prescribed in R.I.G.L., Section 3-5-23.

While the Petitioner acknowledges that even in jurisdictions such as New York and Pennsylvania, where liquor license revocations are considered civil in nature, the exclusionary rule applies without equivocation, the petitioner suggests that the Court de-emphasize the decisions of both those well-respected jurisdictions for the reason that both New York and Pennsylvania have adopted a "blanket application" of the exclusionary rule, which Petitioners allege Rhode Island has done.

The Petitioners further suggest that the case of *United States* v. *Janis*, 428 U.S. 433 (1976), provides solace to a jurisdiction hesitant about expanding the scope of the exclusionary rule. It is submitted that petitioner's reliance upon *Janis*, supra, is misplaced. *Janis*, supra, concerned an illegal seizure of bookmaking records by the State. Because of the illegal seizure, the State could not convict Mr. Janis of a crime; however, the United States sought to obtain $4,956.00 in wagering and excise taxes from the proceeds of the bookmaking. Mr. Janis objected on the ground that the evidence on which the United States predicated its claim was illegally seized. This Court distinguished *Plymouth Sedan*, supra, when it held that the evidence should be admitted. It determined that the matter was intersovereign and that there was no element of penalty involved.

The Petitioner in its brief, seems to accord great weight to the decisions of the Rhode Island Supreme Court in the cases of *State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978) and *Bridges* v. *Superior Court*, 121 R.I. 101, 366 A.2d 97 (1978), and the approach discussed in those decisions. The Rhode Island Supreme Court concluded that deterrence of the unconstitutional methods of police conduct in situations involving revocations of liquor licenses is on balance, of greater importance than the harm, if any, that would follow from the application of the exclusionary rule to such situations.

In essence, it is clearly logical that the Rhode Island Supreme Court, in using the balancing test in *Spratt* and *Bridges*, supra, concluded that the risk of harm to society was a more important consideration than the issue of police deterrence. Obviously, the prospect of having a convicted violator escape the consequences of his actions by application of the exclusionary rule would propose a definite threat to society. In the case at bar, the failure to revoke a liquor license does not pose a similarly severe threat to the welfare of society as would the failure to revoke a person's probation or parole.

Petitioner points to and relies upon the California case of *Rice* v. *Alcoholic Bev. Appeals Bd., Etc.*, 187 Cal. Rptr. 117 (App. 1982) where the court determined that the exclusionary rule is not applicable to an alcoholic beverage license revocation proceeding. In so doing, however, the California court did not undertake the balancing process enunciated in *Calandra* and *Janis* but, instead, made a threshold determination that the exclusionary rule did not apply to administrative proceedings such as presented to the court in that case. It is Respondent's position that the court in *Rice* was incorrect in its determination that the exclusionary rule does not apply to administrative proceedings. See *Camara* v. *Municipal Court*, supra, and *See* v. *City of Seatile*, supra; as well as *Immigration and Naturalization Service* v. *Lopez-Mendoza*, supra. And, since the Court in *Rice* did not take upon itself, as a result of its threshold ruling, to apply the balancing test which is requisite for a determination of application of the exclusionary rule to proceedings other than criminal, it is a case of insignificant precedent on this issue even though it involves a very similar factual pattern as the instant case.

Lastly, even if it were determined that the instant case was purely civil as was *Lopez-Mendoza*, the benefits of exclusion in any event, despite the character of the proceeding, outweigh any costs and require the result of exclusion.

E. The "refinements" to this Court's previous rulings on the application of the exclusionary rule, as suggested by Petitioner in its brief, should not be considered by this Court since they are, upon examination, not refinements at all. Those suggestions made by Petitioner do not hone the balancing process to a sharper certainty so as to bring it closer to the margin in its application. Instead, the refinements would eliminate the balancing process and replace it with what is basically an automatic non-application of the exclusionary rule to circumstances such as the instant case. Such a retrenchment is clearly unwarranted in light of the constitutional imperatives of the Fourth Amendment.

Recent decisions of this Court have reversed the earlier trend toward expansive application of the exclusionary rule. *United States* v. *Calandra*, supra; *Stone* v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Walder* v. *United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed.2d 503 (1954). The Court also significantly reversed that earlier trend toward expansive application of the exclusionary rule in *United States* v. *Janis*, supra.

It appears that the underlying basis of the hesitancy of this Court to continue to expand the exclusionary rule is the lack of "convincing empirical evidence on the [deterrent] effects of the rule." *Janis* at 446. Basically, the *Janis* decision took the position that whether the exclusionary rule is a deterrent has not yet been demonstrated by empirical evidence. The Court in *Janis* then determined that the Court was in no better position than fifteen years earlier when *Mapp* v. *Ohio*, supra, was decided. In determining that, the Court said: Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule." *Elkins* v. *United States*, 364 U.S. at 218.

Respondent believes that compelling empirical evidence has surfaced and should be strongly considered by this Court in its decisions of application and extension of the exclusionary rule. First, that empirical evidence is contained in and considered in some detail by this Court in the case of *Immigration and Naturalization Service* v. *Lopez-Mendoza*, supra. In *Lopez-Mendoza*, at 5193, the Court states that "...and perhaps most importantly, the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers." The

decision then spells out in some detail the workings of that comprehensive scheme. Ultimately, the INS is lauded by the Court for having such a scheme in place. Unfortunately, the Court in *Lopez-Mendoza*, did not make the effort to explore why such a comprehensive scheme for deterring Fourth Amendment violations is in place. It is submitted by the Respondent that the reason for this comprehensive scheme results from the knowledge of INS that without such a scheme evidence seized by them would be subject to exclusion by the exclusionary rule. Can there be any other reason for adopting and implementing such a comprehensive scheme directly related to the Fourth Amendment rights of citizens? I think not. Unfortunately, the Court in *Lopez-Mendoza* overlooked this facet of that comprehensive scheme and, instead, utilized it as a significant basis for determining not to apply the exclusionary rule stating that the scheme "...does reduce the likely deterrent value of the exclusionary rule." *Id.* at 5193. The shunting aside of this empirical evidence is unfortunate for two reasons. The first reason relates to the lament that no such empirical evidence exists. It exists but is apparently ignored. The second reason is because, as noted in *Janis* at 443, the judicial creation of the Fourth Amendment exclusionary rule came "comparatively late" in the legal process. Having arrived comparatively late, the rule should be given additional time to work its benefits, as with the INS, before it is either seriously eroded or discarded altogether. Again, since the rule came "comparatively late" in our jurisprudence, we must consider the long-term and go for distance as concerns whether or not the rule works the "strong medicine" that its proponents claim it to be. Certainly, the comprehensive scheme developed by the INS, as noted in *Lopez-Mendoza*, would indicate that the rule is indeed a medicament. This perspective of the long term was noted by Mr. Justice Brennan in his dissent in *Calandra* where he made reference to a commentator's remarks:

> "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. *Over the long term*, this may integrate some Fourth Amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970) (Emphasis supplied).

The concept of "going for distance" as concerns Constitutional imperatives was referred to in *Miller* v. *United States*, 357 U.S. 301, 313 (1958), where it was stated that:

> "[I]nsistence on observance by law enforcement officers of traditional fair procedural requirements is, *from the long point of view*, best calculated to contribute to that end. However much in a particular case insistence upon such rules appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Miller* v. *United States*, 357 U.S. 301, 313 (1958). (Emphasis supplied).

To continue to retrench from the constitutional imperative protected by the exclusionary rule both promotes lawlessness at a price[13] and fosters the mentality on the part of law officials that it's easier to gain forgiveness than permission.

Lastly, on this point of the availability of empirical evidence, reference is made to the recent study undertaken on behalf of the National Center for State Courts. The three-year study of the search warrant process in seven United States cities has found that although such warrants are viewed as a major protection of privacy and property rights, they are rarely sought by law enforcement officials because it is a "hassle" to obtain them.

Once a warrant is obtained, however, it usually stands up, the study found. Motions to suppress were filed in only 39 percent of the cases studied; only 5 percent of those motions were granted, and only a small fraction of those successful challenges resulted in dismissal of a case, according to the study.

The yet-unpublished study, prepared for the National Center for State Courts in Williamsburg, Va., also concluded that "the exclusionary rule, though seldom invoked, does serve as a disincentive to police officers to misuse or abuse their authority," and that "new broad exceptions to the warrant requirement and exclusionary rule do not appear necessary," especially if some improvements to the warrant process are made.

The study, which covers seven unnamed cities, was conducted by two lawyers—Richard Van Duizend, a staff attorney at the center, and Charlotte A. Carter, a former staff attorney—and Prof. L. Paul Sutton, director of the criminal justice program at San Diego State University.

Among the improvements suggested in their report are several aimed at ending the practice of judge-shopping found

[13] In the words of Mr. Justice Brennan's dissenting opinion in *Calandra* at 365, "In other words, officialdom may profit from its lawlessness if it is willing to pay a price."

in some cities. The practice, which the report said undermines the standard of review contemplated by the Fourth Amendment, could be reduced by having an administrative judge or court administrator monitor the warrant review process and deal with "apparent work load disparities" promptly, or by assigning the review of warrants to a single judge or magistrate for a set period of time.

The researchers concluded that a "properly administered and supervised search warrant process can protect privacy and property rights without significantly impeding effective law enforcement."

But the study found that the process now often is "burdensome, time-consuming, intimidating, frustrating and confusing, and there are many easier ways to get the evidence or otherwise make a case against the accused," and added that "many police officers tend to regard the warrant option as a last resort."

To encourage the use of search warrants, the report recommended such practices as a telephone application process, which it found had cut in half the application time in one city, and the use of a central switchboard to extending court hours to ensure that judges and prosecutors are available for expeditious review of warrant applications.

And noting that the definition of "probable cause" for obtaining a warrant remains "elusive" even after the Supreme Court's ruling last year in *Illinois* v. *Gates*, 103 S.Ct. 2317, the report recommended that instead of waiting for appellate decisions to clarify the standard, a task force of judges, prosecutors, defense lawyers, legal scholars and police officers develop a set of guidelines that could address the major issues presented to judges and magistrates who review search warrants.

Conclusion

The *Janis* balance between cost and benefits comes out in the instant case for applying the exclusionary rule in administrative proceedings civil in nature but having a quasi-criminal result in an intrasovereign situation. The application of the exclusionary rule to an alcoholic beverage revocation proceeding is justified because it adds significant protection to fundamental Fourth Amendment rights. The compelling objective of deterring Fourth Amendment violation requires this result. It is certainly appropriate to extend and apply the exclusionary rule in administering proceedings when the police have searched premises known to be licensed for the sale of liquor and have turned over the fruits of the search to the administrative agency empowered to revoke the license.

Such an approach neither endangers time-honored doctrines applicable to the administration of criminal justice nor makes a nullity of the prohibition against unreasonable searches and seizures under the Fourth Amendment. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasion of privacy. See, *Eaton* v. *Price*, 364 U.S. at 273-274 (Opinion of Mr. Justice Brennan).

Respondent therefore respectfully requests that the decision of the Rhode Island Supreme Court be affirmed.

Respectfully submitted,

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APPENDIX A

Rhode Island General Laws

3-7-21. Appeals from local boards to administrator. — Upon the application of any petitioner for a license, or of any person hereby authorized to protest against the granting of a license, or upon the application of any licensee whose license shall be revoked or suspended by any local board or authority, the liquor control administrator shall have the right to review the decision of any local board, and after hearing, to confirm or reverse the same in whole or in part, and to make such decision or order as to him shall seem proper, but such application shall be made within ten (10) days after the making of the decision or order sought to be reviewed; and notice of said decision or order shall be given by said local or licensing board to the applicant within twenty-four (24) hours after the making of its decision or order; and such decision or order shall not be suspended except by the order of the liquor control administrator.

APPENDIX B

Rhode Island General Laws

42-35-9. Contested cases — Notice — Hearing — Records. — (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short and plain statement of the matters inserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved and detailed statement shall be furnished.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include:

(1) all pleadings, motions, intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof and rulings thereon;

(5) proposed findings and exceptions;

(6) any decision, opinion, or report by the officer presiding at the hearing;

(7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

(f) Oral proceedings or any part thereof conducted under the provisions of this chapter shall be transcribed on request by any party. Stenotypists, occupying positions within the state service as hearing reporters for any state agency, and who report stenographically the proceedings in administrative hearings and also the taking of depositions in their capacity as reporters for a state agency shall be paid at the rate established by § 8-5-5 from the requesting party provided however, the state agency shall not be required to compensate said stenotypists for said transcript.

(g) Findings of fact shall be based exclusively on the evidence and matters officially noticed.

42-35-10. Rules of evidence — Official notice. — In contested cases:

(a) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary matters may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

(b) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;

(c) a party may conduct cross examinations required for a full and true disclosure of the facts;

(d) notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

42-35-14. Licenses. — (a) Whenever the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

(b) Whenever a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency sent notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of such license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

APPENDIX C

Rhode Island General Laws

42-35-15. Judicial review of contested cases. — (a) Any person who has exhausted all administrative remedies available to him within the agency, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a complaint in the superior court of Providence county, or in the superior court in the county in which the cause of action arose, or where expressly provided by the general laws in the sixth division of the district court, within thirty (30) days after mailing notice of the final decision of the agency or, if a rehearing is requested, within thirty (30) days after the decision thereon, provided, however, that any person who is aggrieved by a final decision concerning the assessment or determination of any tax, interest or penalty made by the tax administrator must pay the amount of such tax, interest or penalty to said administrator as a prerequisite to the filing of such complaint. Copies of the complaint shall be served upon the agency and all other parties of record in the manner prescribed by applicable procedural rules within ten (10) days after it is filed in court, provided, however, that the time for service may be extended for good cause by order of the court.

(c) The filing of the complaint does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within thirty (30) days after the service of the complaint, or within further time allowed by the court, the agency

shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency shall modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decision with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
